Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

INTERNATIONAL MEDICAL GROUP, INC.,

Petitioner,

v.

AMERICAN ARBITRATION ASSOCIATION, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The doctrine of "arbitral immunity" has developed over four decades of federal circuit court jurisprudence without any review by the Supreme Court. Under a host of fact patterns involving various legal and equitable claims asserted and barred by the doctrine, the several circuits have developed conflicting standards for application of the doctrine. This case presents an altogether unique situation as well, in that it involves a party injured by "arbitral actions" who has not contractually agreed to arbitrate any dispute, but nevertheless has been denied all judicial remedies, both legal and equitable, against the arbiter in the face of a direct challenge by the arbiter to seek judicial relief.

Thus, the questions presented are whether arbiters and arbitral sponsoring organizations are entitled as a matter of law (rather than by contract) to "immunity" from lawsuits and, if so:

1. to what extent (absolute or qualified) and under what legal standard;

2. whether the immunity applies in a lawsuit filed by a person not a party to any arbitration agreement who seeks the recovery of damages, injunctive relief and declaratory relief; and

3. whether the immunity should be deemed waived as a result of a direct challenge by the arbiter to the non-contracting party to obtain a court-ordered stay of further proceedings by the arbiter.

STATEMENT PURSUANT TO RULE 29.6

Petitioner International Medical Group, Inc. ("IMG") states that it has no corporate parents and, except for Sirius International Insurance Corporation (publ)(which holds approximately 11% of IMG's stock), no publicly held company owns 10% or more of IMG's stock.

Sirius International is not participating in the filing of the Petition for a Writ of Certiorari, and is being served as a Respondent herein.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's entry of May 25, 2001 (per Barker, D.J.), granting respondent's (and others') motion to dismiss is published at 149 F. Supp. 2d 615 (Appendix C, 27a-58a). The district court's subsequent entry of July 26, 2001, granting certain other defendants' motion to dismiss is published at 2001 WL 984808. The district court's entry of judgment on July 26, 2001, is not otherwise published (Appendix B, at 25a-26a). The court of appeals' opinion (per Rovner, C.J., joined by Diane P. Wood, C.J., and Evans, C.J.) affirming the district court's judgment is published at 312 F.3d 833 (Appendix A, at 1a-24a). The court of appeals' order denying rehearing and rehearing en banc (Appendix D, at 59a-60a) is not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on December 3, 2002, and denied rehearing and rehearing en banc on January 8, 2003. On April 2, 2003, Justice Stevens extended the time to file this petition for a writ of certiorari to and including June 6, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The doctrine of arbitral immunity has developed entirely as judge-made law. There are no statutory provisions directly relevant to the issues raised in this petition.

STATEMENT OF THE CASE

Petitioner International Medical Group, Inc. ("IMG"), is an Indiana corporation and acts as a disclosed agent for a disclosed principal, Sirius International Insurance Corporation (publ) ("Sirius"), headquartered in Stockholm, Sweden.[1] IMG is licensed by the state

1. Although a party to the district court and appellate proceedings below, Sirius does not participate in the filing of this petition.

of Indiana to provide agency and administrative services in connection with various international health and medical insurance products, and acts as managing general underwriter and claims administration agent for Sirius on many of the international insurance plans Sirius underwrites as carrier.

In September of 1998 Michael Ogdon submitted to IMG (through an independent insurance agent/broker) an application for health insurance coverage from Sirius. At the time of his application, Ogdon was a citizen of Great Britain and a resident of Vancouver, British Columbia, Canada. In its role as agent for Sirius, IMG accepted the application and bound Sirius to the requested coverage, and issued an insurance certificate to Ogdon providing international health coverage for an initial one-year period.

In his application for insurance Ogdon failed to disclose the existence of certain pre-existing health conditions, as required. Even so, under the terms of the certificate, medical charges incurred for pre-existing conditions were expressly excluded from coverage for the first two years under the plan. In addition, by their contract Sirius and Ogdon agreed that misrepresentations and omissions in the application, as well as fraudulent claims, would void the insurance contract and constitute a forfeiture of all benefits.

Soon after placement of the insurance coverage, Ogdon sought and received medical treatment in Florida relating to his pre-existing conditions and submitted the medical bills to Sirius, through IMG as the plan administrator, requesting payment. Upon investigation and review of the charges and relevant medical records, the claims were denied in total by Sirius pursuant to the exclusion for pre-existing conditions.

Among other efforts undertaken to obtain coverage for the claims, Ogdon filed a complaint against IMG with the Indiana Department of Insurance, and initiated an arbitration proceeding against both IMG and Sirius with the American Arbitration

Association ("AAA").[2] The insurance contract between Ogdon and Sirius includes the following provision:

> If any dispute shall arise as to the amount to be paid under this insurance (liability being otherwise admitted), such dispute shall be referred to arbitration in accordance with procedures of the American Arbitration Association.

Complaint, ¶ 28, Ex. B, *Cert. of Insurance*, pp. 2-3, § B(16).

Upon receipt of the arbitration demand, IMG notified the AAA of the absence of any contract or agreement to which IMG was a party, and challenged the authority of the AAA to exercise "jurisdiction" over IMG and to order IMG to participate in the arbitration.[3]

A series of correspondence subsequently ensued regarding the propriety and administration of the arbitration, pursuant to which the AAA ordered IMG to participate in an arbitration to be held in Miami, Florida, to pay administrative fees to the AAA and make a deposit of compensation to the as yet unselected arbitrator, and to perform certain other tasks and undertakings. Despite further challenges by IMG to the AAA's asserted authority and jurisdiction over it, the AAA ignored the lack of any contractual agreement on the part of IMG, and counter-challenged IMG by declaring "the Association will proceed forward in this matter in the absence of . . . a court order staying this matter [and] the arbitrator [in Florida] shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part." *Complaint*, Exs. L, R. In addition, the AAA ruled that "[t]his case will be administered

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2. IMG timely replied to Ogdon's consumer complaint to the Indiana Department of Insurance, who apparently accepted the reply and found no wrongdoing or impropriety of any kind, and took no further action with respect to the complaint.

3. Sirius likewise challenged the propriety of the arbitration due to the failure of the contractual condition precedent thereto, as Ogdon had acknowledged in his arbitration petition that Sirius had admitted no liability for any of the medical claims. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

under the Association's Rules . . ." and that compensation for the Florida-based arbitrator was an "independent obligation" of IMG. The AAA ordered IMG to "promptly make such deposits with the [AAA] as required by the appointment [of the arbitrator]. . . ." *Complaint*, Exs. H, S.

Faced with this Hobson's choice of demands and orders, and having been twice challenged by the AAA that it would proceed with the arbitration absent a court order staying the matter, IMG (and Sirius) initiated this action by filing a complaint in Indiana state court, which was subsequently removed to federal court.[4]

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4. As a result of Ogdon's unilateral act of naming IMG as a "party" to the arbitration, and the AAA's insistence that it would proceed absent a stay against it, IMG had been placed in a legally perilous lose-lose situation that required it to seek affirmative relief from a court of law. It could neither risk default through a failure to participate in the arbitration after "notice," nor risk a claim of waiver to challenge the propriety of the arbitration by voluntarily participating. IMG could not allow the arbitrator to decide the arbitrability issue (notwithstanding his inherent conflict of interest in the decision) because if the decision was adverse to IMG, Ogdon could then have asserted IMG "waived" its objection to jurisdiction by allowing the issue to be so decided. *See, e.g., Ficek v. Southern Pac. Co.*, 338 F.2d 655, 656-657 (9th Cir. 1964), *cert. denied*, 380 U.S. 988 (1965) (plaintiff, after participating in arbitration while challenging arbitrability, attempted to collaterally attack arbitration award against him as being made "without jurisdiction" and lacking "essential fairness." *Held*: An agreement to arbitrate a particular issue may be implied from the conduct of the parties, and if the issue of arbitrability was in fact submitted to the arbitrator, such action would evince a subsequent agreement for private settlement which would cure any defect in the arbitration clause, thereby waiving any right to challenge the decision. "A claimant may not voluntarily submit his claim to arbitration, await the outcome, and, if the decision is unfavorable, then challenge the authority of the arbitrators to act"); *accord, Fortune, Alsweet and Eldridge, Inc. v. Daniel*, 724 F.2d 1355, 1356-1357 (9th Cir. 1983); *Jones Dairy Farm v. Local No. P-1236, et al.*, 760 F.2d 173, 175-176 (7th Cir. 1985).

On the other hand, had IMG "done nothing" and intentionally failed to participate in the Florida arbitration proceedings after receipt of notice

(Cont'd)

1. IMG's complaint against the AAA was in three counts.[5] Count I sought damages for actions of abuse of process, malicious prosecution and "bad-faith arbitration" based in substantial part upon allegations: that IMG was not a party to the insurance contract or to any other arbitration agreement; that the AAA had no jurisdiction, control or authority over IMG; and that the AAA had a direct economic stake and inherent conflict of interest in the maintenance of the arbitration proceedings, which had been brought in bad faith, were frivolous, unreasonable and groundless, and were being pursued maliciously and for an ulterior purpose and motive.

(Cont'd)
and demand from the AAA to do so — on the assumption that it could simply challenge any future action to confirm an adverse award on jurisdictional grounds — IMG would have been subject to default by Ogdon and the arbitrator, and Ogdon could then have argued in an enforcement action that IMG had waived the ability to subsequently challenge an award entered against it in its absence due to its intentional failure to appear. *See, e.g., Sheet Metal Workers Intern. Ass'n, et al. v. Power City Plumbing & Heating, Inc.*, 934 F.2d 557, 561 (4th Cir. 1991) (arbitration award is valid and fully enforceable against non-participating, subsequently-complaining party who is served with proper notice and was aware of the arbitration proceedings); *accord, Sheet Metal Workers v. Tampa Sheet Metal Co., Inc.*, 786 F.2d 1459, 1460 (11th Cir. 1986); *Syncor Intern. Corp. v. McLeland*, 120 F.3d 262 (Table, Text in Westlaw), unpublished disposition, 1997 WL 452245 (4th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998). *Cf., MCI Telecommunications Corp. v. Exalon Industries, Inc.*, 138 F.3d 426, 429-430 (1st Cir. 1998); *Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138, 139-140 (7th Cir. 1985).

Without supporting evidence in the record or opportunity for rebuttal, the Seventh Circuit unfairly characterized IMG's reaction to this predicament as "curious" and "strange," in violation of the applicable 12(b)(6) standard of review requiring implications arising from the complaint to be construed favorably to IMG. *See*, Appendix A, at 4a-5a, FN 1, and at 12a.

5. Discussion of the proceedings below will be limited to the matters relevant to this petition.

Complaint, ¶¶ 31-37. Count II requested injunctive relief against the AAA to enjoin it from proceeding further with administration of the arbitration. *Complaint*, ¶¶ 38-39. Finally, Count III requested declaratory relief concerning the respective rights and interests of IMG and the AAA in order to judicially determine the challenged "jurisdictional" issues and the prior orders and directives of the AAA, including declaratory relief with respect to the monetary liabilities and obligations allegedly owed by IMG to the AAA. *Complaint*, ¶¶ 40-41.

2. The state court granted IMG's *ex parte* request for a temporary restraining order, and after notice and a hearing subsequently granted IMG's request for a preliminary injunction against the AAA, entering findings and conclusions on several of the factual and legal matters raised in Counts II and III of the complaint. The lawsuit was then removed to federal district court, and the AAA moved to dismiss IMG's claims under Rule 12(b)(6) for failure to state a claim. Specifically, the AAA argued the court lacked jurisdiction over the AAA because it was an "unnecessary defendant" whose presence was tangential to IMG's claims for relief against it, and that the AAA enjoyed arbitral immunity against all of the claims. In the alternative to its immunity argument, the AAA asserted the complaint lacked the factual basis necessary to support the substantive claims asserted by IMG.

3. The district court began its analysis by reviewing the internal rules and procedures of the AAA, which include the following provisions under Rule 50:

> (b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary party in judicial proceedings relating to the arbitration.
>
> * * *
>
> (d) Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules.

Appendix C, at 45a, citing Mot. to Dismiss of AAA [], Brown Aff., Ex. 1, American Arbitration Association, Commercial

Dispute Resolution Procedures (Including Mediation and Arbitration Rules), as amended and effective on January 1, 1999, R-50(b), (d). The district court correctly noted, however, that only Sirius and Ogdon had agreed to adopt these rules by their contract, and that IMG had disputed from the outset of the controversy that it was bound to arbitrate or bound by those rules. Accordingly, the district court held the scope of any "release" to be imposed upon IMG under the rules was an "issue of fact" that could not be resolved on the motion to dismiss. *Id.*, at 46a.

4. Turning to the merits of the AAA's alternative substantive arguments, the district court analyzed the AAA's assertion that it was an "unnecessary party" to the litigation with respect to determining the propriety of the arbitration because it had no interest in the underlying medical claims coverage dispute, and, citing public policies and prior case law, hypothesized that the Indiana Supreme Court would look favorably upon the doctrine of arbitral immunity to the extent IMG's claims against the AAA implicated such interests. *Id.*, at 46a-48a.

5. The district court's analysis also took into consideration the Seventh Circuit's decision in *Caudle v. Am. Arbitration Ass'n*, 230 F.3d 920 (7th Cir. 2000) to resolve ultimately the question of immunity. *Id.*, at 48a-50a. Recognizing that *Caudle* had been finally decided on subject matter jurisdictional grounds, the district court focused on Judge Easterbrook's proposed hypothetical, in dicta, in which the AAA could "neither enjoy immunity nor assert that it was not a real party in interest:"

> Suppose Caudle had paid the full $9,200 the AAA specified, and the Association had pocketed the money without arbitrating the dispute; it is unlikely that the AAA could claim 'immunity' in response to a demand for a refund (or an order to furnish the arbitration service for which it had been paid).

Caudle, at 922. Based on this hypothetical, the district court determined that a claim asserting an independent cause of action against the arbitral body contending liability arising separately and

distinct from proceedings resolving the underlying dispute of the parties to the arbitration contract would *not* be subject to the proposed immunity, and would be one in which the organization is a real party in interest. Appendix C, at 49a. In disregard of IMG's allegations concerning the separate direct financial stakes of the AAA and its arbiters in the maintenance of the proceedings, the district court concluded the AAA had "no interest" in IMG's claims under Counts II and III, and was therefore not a "necessary party" to a fair and complete resolution of those claims, and on such bases dismissed those claims. However, because the district court found IMG's tort-damage claim under Count I to be analogous to the *Caudle* hypothetical, the court found the AAA's contention that it was unnecessary to Count I as "unavailing" in that it might have liability separate from and independent of that of the other defendants. *Id.*, at 50a.[6]

6. In ultimately dismissing Count I, the district court held that IMG had not properly alleged a claim for malicious prosecution (or wrongful use of civil proceedings); determined that IMG's claim styled "bad faith arbitration" was akin to one for abuse of process;[7] and, after setting out the elements for an abuse of process claim, determined that there was no "process" that had been employed by the AAA against IMG, and on that basis dismissed Count I for failure to state a claim. *Id.*, at 51a-57a.[8]

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6. In making this ruling, the district court stated:

> Since we conclude, *infra*, that none of the allegations in Count I state a claim for relief as against the AAA, we need not determine whether it would enjoy arbitral immunity from them as a matter of law. However, the reasoning found in *Caudle* implies that *no per se immunity would exist.*

(Emphasis added) *Id.*, FN 6.

7. Apparently, the claim should have been styled "wrongful exercise of jurisdiction." *See* FN 17, *infra.*

8. The district court cited no authority in support of its conclusion the AAA had not employed "process."

7. On appeal of the dismissals to the Seventh Circuit, the appeals court focused solely upon the issue of arbitral immunity and its relevant parameters to decide the case with respect to the AAA. The appeals court began by recognizing that arbitration is strictly a matter of contract, and a party "'cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" Appendix A, at 12a, citing *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986) (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).

> This is because arbitrators derive their authority to resolve disputes from the prior agreement of the parties to submit their grievances to arbitration. *AT&T*, 475 U.S. at 648-49. But it is not the responsibility of the AAA or even the arbitrator to determine whether a particular agreement creates a duty for the parties to arbitrate a particular grievance. *AT&T*, 475 U.S. at 649. Unless the parties clearly and unmistakably provide otherwise, the question of arbitrability is to be decided by a court, not by an arbitrator. *Id.*

Appendix A, at 12a-13a. Without regard to IMG's objection to the arbitration in the face of no agreement to arbitrate, the Seventh Circuit's opinion nevertheless stakes out a position remarkable for its ambivalence to the principles established by this Court in *AT&T*:

> Once IMG objected to the arbitration, the AAA had only two choices, *to proceed or not to proceed*. The AAA proceeded after determining that its filing requirements had been met and after informing IMG that it could ask a court to determine the arbitrability of the matter.
>
> * * *
>
> Until [such time as IMG obtained a court order staying the arbitration], the AAA *was well within it rights* to proceed with the arbitration. . . (Emphasis added)

Id., at 13a. Nowhere in its opinion does the Seventh Circuit fully identify the "rights" which the AAA supposedly enjoyed over IMG, but they apparently included the right to assert "independent" monetary obligations owed by IMG to the AAA for administrative fees, the right to demand the pre-payment of arbitrator compensation deposits at rates up to $275 per hour and $2,000 per day, the right to order IMG to travel to Miami, Florida, the right to determine, internally and unilaterally, that "its filing requirements had been met" despite the lack of any agreement or consent of IMG, and the right to suggest IMG "raise this issue with the arbitrator at or prior to the hearing." *See*, *Complaint*, Exs. H, L, R, S. Missing also from the Seventh Circuit's decision is any explanation or citation indicating from what authority such "rights" derive or emanate, there being no reference to any constitutional penumbras or to any federal or state statutes.[9] Finally, lacking was any discussion of the courses of action available *to Ogdon* had the AAA chosen to follow the second of its available options: the choice *not to proceed* with the arbitration in the face of IMG's challenge.[10]

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9. The Seventh Circuit's reference to the existence of affirmative "rights" in favor of arbiters over private citizens (beyond the mere "right" to immunity from suit) crossed a new threshold within arbitral immunity jurisprudence by raising an issue previously unchartered by any precedent.

10. IMG submits this entire controversy could have been avoided had the AAA chosen this second option, for it would then have been up to Ogdon to decide whether to file a court action to "compel" IMG to arbitrate. *See*, *e.g.*, 9 U.S.C. § 4; Indiana Code § 34-57-2-3(a). Without a contract agreeing to arbitration, however, surely Ogdon would have been dissuaded from pursuing the matter against IMG further, as any suit to compel would have been subject to summary disposition in IMG's favor under *AT&T*. More than three years ago, in correspondence dated April 12, 2000 (Complaint, Ex. M), IMG requested the AAA to "[p]lease state the legal and factual basis upon which the Association has determined and concluded that it has authority, control or other personal jurisdiction over IMG." To this day, IMG has received no response from the AAA, the district court, or the Seventh Circuit Court of Appeals.

8. The appeals court cited several prior circuit court decisions dealing with the arbitral immunity doctrine, and indicated the cases "uniformly support arbitral immunity in situations such as occurred here." Appendix A, at 13a-15a, citing its prior decision in *Tamari v. Conrad*, 552 F.2d 778, 780 (7th Cir. 1977), and decisions from the First, Fifth, Eighth and Second Circuits (*none of which* involved claims against an arbiter asserted by a non-contracting party).[11] Noting that "arbitrators have no interest in the outcome of the [underlying] matter," *Tamari*, 552 F.2d at 781, the appeals court opined:

> IMG or any party to an arbitration can obtain relief by seeking a stay against the party bringing the arbitration. There is no need to seek a stay against the sponsoring organization. *Tamari*, 552 F.2d at 781.

Appendix A, at 14a.

9. Notwithstanding the acknowledged and required 12(b)(6) standard of review to construe IMG's complaint liberally in favor of IMG, and to accept as true all well-pled allegations and any inferences that may be reasonably drawn from them, the appeals court concluded its analysis by adopting a strained explanation of Judge Easterbrook's prior *Caudle* hypothetical, by simply ignoring many of the well-pled allegations of IMG's complaint, and by concluding based on spotty authoritative support that the injurious actions of the AAA, including its assertion of debts owed and demands for pre-payment of fees, were mere "administrative mistakes," for which IMG's "appropriate remedy" was to:

> . . . seek injunctive relief against [Ogdon] in an appropriate court. The AAA need not be a party to that action and should be spared the burden of

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11. *New England Cleaning Servs., Inc. v. American Arbitration Ass'n*, 199 F.3d 542 (1st Cir. 1999); *Hawkins v. National Ass'n of Sec. Dealers, Inc.*, 149 F.3d 330, 332 (5th Cir. 1998); *Olson v. National Ass'n of Sec. Dealers*, 85 F.3d 381, 382 (8th Cir. 1996); *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 883 (2nd Cir 1990), *cert. denied*, 498 U.S. 850 (1990).

> litigating the appropriateness of *its exercise* of jurisdiction.
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> * * *
>
> . . . the AAA did nothing more than docket a properly filed demand for arbitration [and] the AAA did not abuse the process when it declined IMG's invitation to determine that the arbitration should not go forward. In sum, the AAA neither initiated nor caused to be initiated any process at all, and thus can not be held liable for abuse of process.

(Emphasis added) *Id.*, at 16a-18a.[12] In sum, the appeals court held the "AAA is immune from a suit based on wrongful exercise of jurisdiction . . . [and] . . . enjoys immunity from suit" under the circumstances pled by IMG in its complaint. *Id.*, at 17a, 18a.

10. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

The petition should be granted for three reasons. *First*, the Seventh Circuit's decision conflicts with prior holdings and legal principles established by this Court, and adopts a standard for "arbitral immunity" that conflicts with the standards employed by other circuits, of which there are several. It espouses the legal principle that a private person or entity who has made no jurisdictional contract to arbitrate a dispute and given no consent or authority to any arbitrator, is left with no remedy either in law or in equity to recover economic damages caused by the arbitrator while acting in clear absence of jurisdiction, or to enjoin him from further pursuit of the proceedings, or to declare the parties' respective rights and interests when faced with assertions of

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12. The appeals court did not identify the legal theory under which IMG could recover damages caused by the AAA via "injunctive relief" against Ogdon, nor did it explain how, in such an action, if the AAA was not a party, IMG could have sought and had declared the respective rights and interests of IMG and the AAA with regard to the financial obligations established and asserted solely by the AAA.

independent debts owed and monies due arising from a frivolous demand for arbitration launched ultimately as part of an underlying fraud. That holding is contrary to the principles established in this Court's decisions in *AT&T* and *First Options*, *supra*, which hold that arbitration is entirely a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. The Seventh Circuit's decision also holds that private arbitral sponsoring organizations, arbitrators, and their respective staffs and employees are all entitled to absolute immunity from suit based on a wrongful exercise of jurisdiction, notwithstanding a clear absence of jurisdiction. That holding is contrary to the principles established in this Court's decisions in *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) and *Mireles v. Waco*, 502 U.S. 9 (1991), which explicitly recognize an exception to the doctrine of judicial immunity when a judge acts in clear absence of all jurisdiction. Finally, the Seventh Circuit's decision creates a new, broad, absolute standard for the doctrine of arbitral immunity that does not square with the standards used and developed in the First, Second, Fifth, Sixth, Eighth, and Ninth circuits, and crosses new boundaries in American law by announcing affirmative "rights" in favor of arbiters over private citizens, thereby making application of its decision among the circuits unworkable. Because this Court has never reviewed the doctrine of arbitral immunity spanning more than forty years of developing circuit court jurisprudence, the time is ripe for a comprehensive review by this Court in light of the circumstances of this case.

Second, the Seventh Circuit's decision violates constitutional principles of due process and equal protection of the laws by denying IMG any legal or equitable remedies against another private party that has caused it economic harm, that has ordered the payment of money to and for the benefit of itself and unrelated third persons, and that has demanded IMG undertake other actions amounting to involuntary servitude. The decision grants special, sweeping privileges and immunities to an undefined and unregulated group of private individuals and entities who participate in an occupation called "arbitration," and whose membership in the group arises solely as a

result of their own pronouncement they are a member of the group, thereby trampling upon the long-established American principle that no man is above the law. Review should be granted to correct these errors, and to prevent future or further wrongs to be committed by members of the group.

Finally, the appeals court's decision, as a practical matter, opens wide the doors to permissible unchecked bias and prejudice within the realm of alternative dispute resolution — operating otherwise as a necessary counter-balance and avenue of relief to the over-burdened judicial system — and authorizes: unfettered abuse of forum selection tactics on a national level; frivolous and harassing "arbitral" litigation against innocents by international defrauders and extortioners; and illegitimate claims to "immunity" by collusive or unscrupulous arbiters in the face of outdated or changing public policy concerns that may no longer be relevant.

I. Certiorari Is Warranted Because The Decision Below Conflicts With Decisions Of This Court And Of Other Circuits.

The claims for recovery of damages and for injunctive and declaratory relief asserted by IMG in its complaint against the AAA arise separately from the underlying insurance coverage dispute between Ogdon and Sirius, notwithstanding IMG's role as plan administrator. Rather, IMG's claims stem from acts and omissions undertaken by the AAA and its employees and staff members during the AAA's "administration" of the arbitration demand filed by Ogdon. As the Seventh Circuit indicated, the AAA could very easily have elected not to proceed against IMG. However, when the venerable AAA for its own account and for the account of its affiliated arbiters sends written communications to a neutral company claiming jurisdiction over it and ordering the company to do things against its will, asserting that monetary obligations are owed and demanding payment of funds by the company, and causing economic harm to the company in the process, such actions create controversies solely between the AAA and the neutral company. IMG has no lawful

recourse for these matters against Ogdon, and attempts to do so would expose IMG to claims of frivolity. The Seventh Circuit's holding asserts nonetheless that the AAA and its employees are without exception immune from any lawsuit based on a wrongful exercise of jurisdiction, relying on a history of cases formulating the doctrine of arbitral immunity as applied to persons who, unlike IMG, had voluntarily entered into arbitration agreements.

This Court has consistently recognized that arbitration is a matter of contract, and a person can not be required to submit to arbitration any dispute which he has not agreed to so submit. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648-49 (1986), quoting *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). *See also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). While acknowledging these precedents, everyone involved in this case — Ogdon, the AAA, the District Court, and the Seventh Circuit — has recognized that IMG is not and has never been a party to any arbitration agreement relevant to this case.

Based on the prior decisions of this Court, it follows logically that if arbitration is solely a creature of voluntary contract, and if there exists no contract between an injured party and an arbiter who causes the injuries, then no concepts of arbitral immunity can arise or be imposed upon the non-contracting injured party. The decision below violates the principles established by this Court. Because all parties agree there is a clear and unmistakable absence of any arbitration agreement, the Seventh Circuit's imposition of immunity in favor of the AAA and against IMG should be reviewed by this Court to determine whether the doctrine of arbitral immunity applies under the facts of this case.

In addition to determining the applicability of the arbitral immunity doctrine in this case, this Court should grant the petition to resolve the deepening conflicts among the circuits with respect to the varying standards used to apply the arbitral

immunity doctrine. In the face of IMG's allegations, the Seventh Circuit's decision appears to be a broad grant of truly "absolute" immunity to the AAA, without exception. Despite IMG's claims of wrongful exercise of jurisdiction and acts undertaken in the clear absence of any jurisdiction, the appeals court has implemented a standard exceeding even the limits of immunity established by this Court with respect to the administration of justice and the carrying out of public functions generally, and in direct conflict with the standards for the grant of arbitral immunity as established by other circuit courts of appeal.

In *Mireles v. Waco*, 502 U.S. 9 (1991) (*per curiam*), this Court recognized a long line of precedents acknowledging the *general* rule that a judge is immune from a suit for money damages. *Id.*, at 9-10, and cases cited. However, in *Mireles* the Court recognized that judicial immunity is not entirely absolute, and may be overcome in two distinct sets of circumstances:

> First, a judge is not immune from liability for non-judicial actions, *i.e.*, actions not taken in the judge's judicial capacity. *Forrester v. White*, 484 U.S. [219], at 227-229, 108 S.Ct., at 544-545 [(1988)]; *Stump v. Sparkman*, 435 U.S. [349], at 360, 98 S.Ct., at 1106 [(1978)]. Second, a judge is not immune for actions, *though judicial in nature*, taken in the complete absence of all jurisdiction. *Id.*, at 356, 357, 98 S.C., at 1104-1105; *Bradley v. Fisher*, 13 Wall., at 351.

(Emphasis added) *Mireles*, 502 U.S. at 11-12. Because the judge-made doctrine of arbitral immunity is based to a large extent, if not entirely, upon the judge-made law of judicial immunity (such history is discussed in more detail, *infra*, Section III), it follows logically that the bounds of arbitral immunity as established by the circuit courts cannot exceed the bounds of judicial immunity as established by this Court. Because the Seventh Circuit's decision recognizes no exception to the doctrine of arbitral immunity — even in the complete absence of all jurisdiction or for actions not taken in the arbiter's

arbitral capacity (*AT&T* dictates there can be no such capacity without contractual consent) — the petition should be granted in order for this Court to make clear the circumstances under which the grant of arbitral immunity may be overcome. For if a judge is not immune for actions taken in the complete absence of all jurisdiction, and if the AAA has no jurisdiction in the complete absence of any contract entered into by IMG, then claims arising from the actions of the AAA taken without lawful capacity and in complete absence of all jurisdiction should not be suppressed or barred by a grant of immunity. If this is not so, then this Court's limitations regarding immunity have no true effect, its words have no true meaning, and one can conceive of no set of facts beyond the facts of this case where any exception to arbitral immunity would apply.

In *New England Cleaning Services, Inc. v. American Arbitration Ass'n*, 199 F.3d 542 (1st Cir. 1999), the First Circuit Court of Appeals held that arbitral immunity applies in favor of arbiters and arbitral sponsoring organizations "unless there is a 'clear absence' of jurisdiction." *Id.*, at 545-546, citing this Court's decision in *Stump v. Sparkman*, *supra*, and its own prior decision in *Cok v. Cosentino*, 876 F.2d 1, 2 (1st Cir. 1989) (same holding). Although the Seventh Circuit cited *New England Cleaning* in support of the positions it took in this case, including a parenthetical referral to the First Circuit's express limitation upon the application of the doctrine, the appeals court conspicuously failed to apply the qualified standard to IMG's claims.

In *Honn v. National Ass'n of Securities Dealers, Inc.*, 182 F.3d 1014 (8th Cir. 1999), the Eighth Circuit Court of Appeals focused more narrowly upon the particular arbitral acts and functions complained of, and held that arbitral immunity would apply only if the arbiter "was performing functions *that were necessary* to arbitration administration at the time of the alleged wrongdoing, and [if such] acts were *within the scope* of the arbitral process . . . [and] . . . were taken while . . . carrying out its *normal administrative functions*." (Emphasis added)

Id., at 1017-1018. Yet in this case we know the AAA had *the choice* to proceed or not to proceed, as acknowledged by the Seventh Circuit. It therefore cannot be said that its actions against IMG were *necessary* to the administration of the proceeding — an element required by *Honn* — or that such actions were undertaken "within the scope" of "normal" administrative functions that require the existence of an explicit contractual submission to initiate the proceedings. Prior to *Honn*, the Eighth Circuit had ruled simply that arbitral immunity protects "all acts within the scope of the arbitral process," *see*, *Olson v. National Ass'n of Securities Dealers*, 85 F.3d 381, 383 (8th Cir. 1996), and the Second Circuit has applied a similar standard, but only so long as the functions performed are part of a "*contractually agreed upon* arbitration proceeding." (Emphasis added) *Austern v. Chicago Bd. Options Exchange, Inc.*, 898 F.2d 882, 886 (2nd Cir. 1990), *cert. denied*, 498 U.S. 850 (1990).

In *Hawkins v. National Ass'n of Securities Dealers, Inc.*, 149 F.3d 330, 332 (5th Cir. 1998), the Fifth Circuit Court of Appeals held that an arbitral sponsoring body enjoys arbitral immunity from civil liability for the acts of its arbitrators arising "in the course of conducting *contractually agreed-upon* arbitration proceedings." (Emphasis added) *Id.*, at 332.[13]

In the Ninth Circuit arbitrators are immune from civil liability "for acts *within their jurisdiction* arising out of their arbitral functions in *contractually agreed upon* arbitration *hearings*." (Emphasis added) *See United States v. City of Hayward*, 36 F.3d 832, 838

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13. For reasons unknown, the circuit court in *Hawkins* did not cite its earlier opinion in *E.C. Ernst, Inc. v. Manhattan Const. Co. of Texas*, 551 F.2d 1026 (5th Cir. 1977), *cert. denied*, 434 U.S. 1067 (1978). In *Ernst*, the Fifth Circuit reviewed whether the application of immunity may be available to architects while performing quasi-judicial arbitral functions, and held ultimately that the arbiter had unreasonably delayed acting pursuant to his appointment, and had thereby defaulted on contractual duties owed to the arbitration participants, causing damages as a result, and therefore was not entitled to arbitral immunity for actions arising from his conduct in breach of the tri-party arbitration agreement. *Id.*, at 1033-1034. *Cf.*, *Caudle* hypothetical, *supra*.

(9th Cir. 1994), citing *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1583 (9th Cir. 1987). However, in *City of Hayward* the Ninth Circuit determined that because the City had appointed the arbitrator pursuant to an ordinance mandating arbitration rather than by contract as a bona fide arbitral sponsoring organization, the City could be held vicariously liable for the arbitrator's actions. *Id. Cf., Kemner v. District Counsel of Painting and Allied Trades No. 36*, 768 F.2d 1115, 1119 (9th Cir. 1985) (plaintiff entitled to sue for relief directly against arbitration panel for acts taken "in excess" of the panel's jurisdiction).

In the Sixth Circuit arbitral immunity extends to insulate arbitrators from liability in legal actions "for those acts committed *while performing in his official capacity* [as arbitrator]." (Emphasis added) *See International Union, et al. v. Greyhound Lines, Inc.*, 701 F.2d 1181, 1187 (6th Cir. 1983).[14] *Cf., Corey v. New York Stock Exchange*, 691 F.2d 1205, 1211 (6th Cir. 1982) ("it is appropriate that immunity be extended to arbitrators for acts *within the scope of their duties* and *within their jurisdiction* . . . where arbitration is *pursuant to a private agreement* between the parties") (Emphasis added).

None of these circuit court decisions can be reconciled with the holding of the Seventh Circuit in this case. In light of the varying standards for the imposition of the doctrine of arbitral immunity as espoused by the several circuit courts of appeal, IMG's petition should be granted to rectify such conflicts.

II. Certiorari Is Warranted Because The Decision Below Violates IMG's Rights Under The Privileges And Immunities, Due Process, And Equal Protection Clauses Of The 14th Amendment.

The Declaration of Independence states: "All men are created equal, [and] are endowed . . . with certain inalienable rights, [including] . . . liberty, and the pursuit of happiness."

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14. The *Greyhound* court "intimate[d] no view point, however, as to whether the doctrine of arbitral immunity would bar an action for *equitable relief* as well." (Emphasis added) *Id.*, at FN 10.

The right to enjoy liberty and pursue happiness is one of America's strongest foundations, and has been broadly construed to mean that private individuals have a right to be free from unreasonable government intrusion and interference in their daily lives and from the imposing activities of other third parties.[15] Section 2 of Article IV of the United States Constitution provides "citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Section 1 of the 14th Amendment to the Constitution proclaims that no state "shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of . . . liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws." In this case, the Seventh Circuit has exercised powers beyond those prohibited to the states by granting special court-made privileges, powers, and immunities to private citizens and companies acting as arbitrators and/or as organizations that sponsor arbitrations, in contravention of these constitutional principles and in violation of IMG's constitutional rights.[16]

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15. The guarantee of liberty

> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *See, also, Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 95 (1996).

16. This Court has recognized the "inherent dangers" in judge-made tort standards as a result of the

> undue rigidity which results from the unfortunate feeling, that any decision of a court creates a rule of law which, as law, is absolutely and eternally valid. . . . To regard a standard of conduct as fixed and immutable because judicially announced, is to create a standard which however

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The Constitution simply does not "tolerate classes among citizens," whether by insidious race classifications or merely because of a self-chosen occupation. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989). "No man in this country is so high that he is above the law." *United States v. Lee*, 106 U.S. 196, 220 (1882). *See also Butz v. Economou*, 438 U.S. 478, 506 (1978). "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 1 Cranch 137, 163, 2 L. Ed. 60 (1803).

With seeming insouciance to these constitutional principles, the Seventh Circuit has held the AAA, a private party who has allegedly injured another private party, "should be spared the burden of litigating *the appropriateness* of its *exercise of jurisdiction* . . . [and] . . . is immune from a suit based on *wrongful exercise of jurisdiction*." (Emphasis added) Appendix A, at 17a.[17]

It is uncontested the AAA is privately owned and operated, employs private individuals, and offers arbitration services to private contracting parties for a fee.[18] It is further uncontested that

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> just or even necessary at the time, may become a scandal and a hissing in the future.

Francis v. Southern Pac. Co., 333 U.S. 445, 453-454 (1948), citing Professor Bohlen, *Studies in the Law of Torts*, 610-611 (1926).

17. IMG can locate no federal case discussing a cause of action for "wrongful exercise of jurisdiction." *Cf., Bell v. Sellevold*, 713 F.2d 1396, 1404 (8th Cir. 1983); *Lotz Realty Co. v. United States*, 757 F. Supp. 692, 693 (E.D. Va. 1990); *United States v. Barnes*, 175 F. Supp. 60, 64 (S.D. Cal. 1959). *See, also*, Appendix A, at 17a, FN 4, and Appendix C, at 51a.

18. Although chartered as a "not-for-profit" company, such appellation does not absolve the AAA from the financial conflicts complained of here by IMG, as the fair implication is the AAA remains motivated, at least in part, by the receipt of income and revenue. *Cf., Tamari*, 552 F.2d at 780-781 (arbitrators were "volunteers" serving "at nominal pay").

IMG has not entered into any agreement to arbitrate any dispute. In its complaint, IMG alleges the AAA: demanded payment of money from IMG and asserted IMG was so obligated; issued "rulings" purporting to directly affect IMG's private rights and interests; and ordered IMG to travel from Indiana to Florida to participate in arbitration proceedings, pay AAA-selected arbitrators at hourly or daily rates established by those arbitrators, and submit to the decision of the arbitrator the propriety of IMG's involvement. *Complaint*, ¶¶ 29-37, 41, Exs. G-T. No one has disputed IMG's allegation the AAA clearly lacked any contractual or other legal authority to exercise such "jurisdiction" over IMG. Appendix A, at 12a, citing *AT&T*, *supra*, at 648-649.

According to the appellate court's ruling, IMG has no right to seek a stay or declaratory relief concerning these matters despite the holdings of this Court in *AT&T* and despite the AAA's repeated direct challenges to IMG to pursue such relief.[19] In addition, IMG has been denied any right to seek the recovery of damages caused by the AAA. The complaint alleges the AAA made material misrepresentations of fact and intended to deceive IMG; that in disregard of its rules (waived in favor of Ogdon), the AAA intended to profit from the arbitration proceedings and had a direct economic stake therein; that the directives and orders issued by the AAA were frivolous, unreasonable and groundless, and were pursued for an ulterior purpose and motive; and that IMG had been damaged as a result. *Complaint*, ¶¶ 29-37, 41, Exs. G-T. Except for the fact that

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19. The AAA's gauntlet was clearly and distinctly communicated, raising the question of whether the AAA had thereby waived any entitlement to assert the immunity doctrine as a defense. *See, e.g., Austin Mun. Securities, Inc. v. Nat'l Ass'n of Securities Dealers*, 757 F.2d 676, 691 (5th Cir. 1985) (waiver of immunity will be upheld if made intentionally, clearly and distinctly); *Ford Motor Co. v. Dept. of Treasury, State of Indiana*, 323 U.S. 459, 465 (1945) (state's immunity from suit under 11th Amendment may be waived by consent); *Copper S.S. Co. v. State of Mich.*, 194 F.2d 465, 467 (6th Cir. 1952) (implied waiver of immunity recognized, but should be clearly established).

IMG had made no arbitration contract, none of these allegations were considered by the Seventh Circuit in its decision.[20]

As private citizens whose power and authority derives solely from the consensual contract of others seeking their services, the AAA and its employees hold no unique qualifications or licenses to act as arbitrators or arbitration administrators. In this country they can obtain their power, quite literally, from an agreement scrawled on the back of a paper napkin. In the vast majority of cases they are not elected, certified, regulated or subject to any governmental authority or code of professional ethics. A Google.com internet search using the term "arbitration services" produces more than 800 links to over 590,000 webpages posted by various private individuals and companies from every conceivable corner of the nation who, like the AAA and its arbiters, offer private arbitration services to privately-contracting parties, for a fee. Consider as well local print advertisements published by arbitrators offering their services. Most are well-respected professionals within a given field of expertise, whether it be law, labor relations, the securities industry, or architecture, and the industry serves to employ and provide income for literally thousands of attorneys, retired judges, architects, and other specialists.

To become an arbitrator or "arbitral sponsoring organization," one only needs to declare and privately offer himself up as such. Thereafter, arbitrators and sponsoring bodies are free to establish the rules and conditions that will apply to the performance of their services. They are free to demand that contracting parties desiring their services accept such rules and conditions before proceeding with arbitration, and they are free to set the fees and compensation by which they will be paid. Of course, persons considering the retention of such services are reciprocally free to reject such rules and conditions, and to forego any decision to arbitrate.

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20. In reviewing a dismissal under Rule 12(b)(6), the court must read the complaint liberally in favor of IMG and accept as true all well-pled allegations and inferences that may reasonably be drawn from them. Appendix A, at 12a.

Under the Seventh Circuit's decision private arbitrators and arbitral bodies (and their respective staffs and employees) are deemed a special class of privileged and powerful citizens that can assess debt obligations, demand payments of money, cause economic or physical harm, and order all other U.S. citizens to travel unwillingly about the country, all without any legal authority or jurisdiction to do so, and without recourse. If such immunities are extended to the bounds permitted by this Court in *Mireles* (with respect to judges), arbiters could conceivably act maliciously and corruptly, in bad faith, and commit intentional torts, and they would be absolutely immune from a suit for damages or to enjoin further such actions, or even to declare the respective rights of the parties.

Imagine the AAA-appointed arbitrator in Miami who charges $2,000 per day for his services learning that IMG's president was in Florida vacationing with his family or attending a friend's daughter's wedding or an important business meeting, while Ogdon and his lawyers were sitting patiently in his office waiting to proceed with the AAA-ordered arbitration hearing against IMG, and then ordering two of his biggest staff members to "forcibly and with excessive and unreasonable force" seize IMG's president, cursing him and calling him vulgar and offensive names, and slamming him through the office doors so that the Ogdon arbitration could rightly proceed for as many $2,000 days as it would take to resolve the controversy under the tutelage of the arbitrator. *Cf.*, *Mireles*, *supra*, at 9 (where like occurrences were summarily held by the Court as not subject to legal recourse under the doctrine of judicial immunity). In light of the myriad of similarly horrifying fact patterns imaginable, the Court should grant IMG's petition to review the constitutionality of the Seventh Circuit's opinion under the facts alleged.

III. The Petition Should Be Granted To Prevent Abuse Of The Alternative Dispute Resolution System, And Because The Policy Reasons For Immunity Are No Longer Valid.

The judge-made law of judicial and quasi-judicial immunity has a long history in the federal and state courts, although this Court has never dealt directly with the doctrine of arbitral immunity.[21] This Court's "long line" of precedents acknowledging judicial immunity as identified in *Mireles* begins in 1872 with the case *Bradley v. Fisher*, 13 Wall. 335, 347, 20 L. Ed. 646 (1872). *Mireles*, *supra*, at 9. Like other forms of official or governmental immunity, judicial immunity is an immunity *from suit*, not just from an ultimate assessment of money damages. *Id.*, at 11, citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Recognizing the exceptions to immunity for actions not taken in a judicial capacity or for actions, though judicial in nature, taken in the complete absence of all jurisdiction, the Court in *Mireles* discussed the characteristics and distinguishing features of these acts, and indicated the relevant inquiry is the "nature" and "function" of the act, not the "act itself." *Id.*, at 12, citing *Stump v. Sparkman*, 435 U.S. at 362. This Court held that if a judge is performing the general functions "normally performed" by a judge, though in error, committed in bad faith, in "excess" of his authority, or even committed maliciously and corruptly, the judge is nevertheless entitled to maintain the immunity even if the judge orders court officers to commit a battery upon an attorney who was supposed to be in his courtroom, but was not. *Id.*, at 12.

The doctrine of arbitral immunity is typically referred to as a "qualified immunity," based upon the quasi-judicial nature of the acts performed by arbiters. The history of litigation aimed at arbitrators is fairly easily reviewed, for there are relatively few reported cases. The Seventh Circuit's *Tamari* decision from 1977, *supra*, appears to be the first in the federal appeals courts which

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21. Some courts refer to arbitral functions and activities as "'quasi-judicial,' . . . whatever that may mean." *See, e.g., Craviolini v. Scholer & Fuller Associated Architects*, 89 Ariz. 24, 27, 357 P.2d 611, 613 (1961).

actually granted an arbiter full immunity from suit. Subsequent leading circuit court opinions have been cited, above.[22]

A review made by the district court in *Hill v. Aro Corp.*, 263 F. Supp. 324, 325-326 (N.D. Ohio 1967), indicates the doctrine had its American roots in an 1880 case before the Iowa Supreme Court. *Id.*, citing *Jones v. Brown*, 54 Iowa 74, 6 N.W. 140 (1880). The *Hill* court also reviewed cases decided in various state courts, including Massachusetts, Maine, Minnesota, and New York.[23]

In addition to judges and arbitrators, courts have extended immunities to various other individuals acting in governmental or other official capacities.[24] *See, generally, Austin Mun. Securities, Inc. v. National Ass'n of Securities Dealers, Inc.*, 757 F.2d 676, 687-688 (5th Cir. 1985), and *International Union, et al.*

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22. *See also Lundgren v. Freeman*, 307 F.2d 104 (9th Cir. 1962) (architects acting as "quasi-arbitrators" may be held liable in tort for fraud or wilful and intentional misconduct; for inducing a breach of contract; for actions taken in bad faith and with intent to cause injury; or if not otherwise acting "within the scope of their authority"); *Cahn v. International Ladies' Garment Union*, 203 F. Supp. 191 (E.D. Pa.1962), *aff'd*, 311 F.2d 113 (3rd Cir. 1962) (arbitrator not entitled to immunity for "harassing" actions not arising out of the performance of appointed duties).

23. *Id.*, at 325-326, citing *Hoosac Tunnel Dock and Elevator Co. v. O'Brien*, 137 Mass. 424 (1884); *Hutchins v. Merrill*, 109 M.E. 313 (1912); *Melady v. South St. Paul Live Stock Exchange*, 142 Minn. 194 (1919); *Babalon Milk & Cream Co. v. Horvitz*, 151 N.Y.S.2d 221 (Sup.Ct. 1956), *aff'd*, 4 A.D.2d 777, 165 N.Y.S.2d 717 (1957).

24. The privileges have been applied to the President of the United States (*Nixon v. Fitzgerald*, 457 U.S. 731 (1982)), prosecutors (*Imbler v. Pachtman*, 424 U.S. 409 (1976)), legislators (*Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975)), legislative aides acting in their legislative capacity (*Gravel v. United States*, 408 U.S. 606 (1972)), executive branch officials acting as administrative law judges (*Butz v. Economou*, 438 U.S. 478 (1978)), prison administrators (*Procunier v. Navrette*, 434 U.S. 555 (1978)), hospital superintendents (*O'Connor v. Donaldson*, 422 U.S. 563 (1975)), school administrators (*Wood v. Strickland*, 420 U.S. 308 (1975)), and state executive officials (*Scheur v. Rhodes*, 416 U.S. 232 (1974)).

v. Greyhound Lines, Inc., 701 F.2d 1181, 1185 (6th Cir. 1983). In these cases the courts explain, ratify and/or adopt various policy reasons for granting immunities in favor of individuals who have allegedly done wrong, as against the presumed interests of the "victims" to seek redress or recourse through a judicial remedy, and have generally applied these policies as well to arbiters.[25]

None of these policy reasons apply to this case, however. Having made no contract to participate in the arbitration process, IMG in fairness should not be burdened with "immunities" granted in favor of other private individuals who have made the arbitration choice on their own terms. In this case, because Ogdon and IMG made no contract to arbitrate disputes between them, he had no right to initiate an arbitration proceeding against IMG. *AT&T*, 475 U.S. at 648. Faced with this clearly deficient demand the AAA had only two choices: "to proceed or not to proceed." In making that decision, the AAA needed no protection from undue influence, IMG was not a "dissatisfied litigant," and the AAA could have easily avoided being caught up in the "struggle" between Ogdon and IMG by choosing the passive option. The AAA could have easily decided not to proceed in the face of the absence of any contract authorizing its jurisdiction over IMG, and could have just as easily declined Ogdon's invitation to do so until presented with an order from an appropriate court compelling IMG to submit to arbitration.

25. *See, e.g., New England Cleaning, supra*, 199 F.3d at 545 (arbitral immunity is essential to protect decision-makers from undue influence and protect the decision-making process from reprisals by dissatisfied litigants); *Caudle, supra*, 230 F.3d at 922 (arbitrators "have no interest in the outcome of the dispute between [the parties to the underlying contract], and they should not be compelled to become parties to that dispute"); *Tamari, supra*, 552 F.2d at 781 (individuals cannot be expected to volunteer to arbitrate disputes if they can be caught up in the struggle between the litigants and saddled with the burdens of defending a lawsuit). *Cf., Butz v. Economou*, 438 U.S. 478, 506 (1978) (personal action for damages against official who abused office may offer victim only "realistic method" for vindicating constitutional guarantees. Foreclosing victim's ability to bring suit increases the potential for lawless conduct); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 410 (1971).

Although it is true the AAA and its arbiters may have had no interest in the outcome of any coverage dispute between IMG and Ogdon (or, more accurately, between Ogdon and Sirius), it cannot be argued the AAA and its arbiters did not have a direct financial interest *in the arbitral process itself*, as it is their very business to charge administrative fees and arbiter's fees for providing their respective services, the undertaking for which is the very method by which they make their livings, receive wages, and otherwise receive income to cover the costs of operations.

Except for Judge Easterbrook's *Caudle* hypothetical, *supra*, not a single case authority cited in this petition discusses the significance of the financial stake or financial interests of the arbiters in the arbitral process itself, or undertakes a complete balancing of the respective rights and conflicting interests which could develop as between an arbiter and a non-contracting party such as IMG. As the proponent for the application of the immunity doctrine in its favor, the AAA bears the burden of showing that such immunity is justified for the wrongful activities in question.[26] As part of meeting that burden, the AAA must show why IMG's private rights of redress for the injuries suffered at the hands of the AAA should be relegated to a subordinate position in favor of arbitral immunity.[27] In the proceedings below the AAA made no attempt to meet this burden.

The Court should therefore consider whether the doctrine of arbitral immunity should continue to exist at all, or be abolished as unnecessary. The principles of the doctrine were born of an age when integrity stood behind an agreement by handshake. In conducting business, people used ribbon typewriters, messy carbon paper, and inefficient and unreliable "snail mail." It is therefore not difficult to envision the need long ago for courts to

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26. *See, e.g., Doyle v. Camelot Care Centers, Inc.*, 305 F.3d 603, 622 (7th Cir. 2002), citing *Burns v. Reed*, 500 U.S. 478, 486 (1991).

27. *See, e.g., Dennis v. Sparks*, 449 U.S. 24, 31-32 (1980) (potential harm to public from denying immunity to private co-conspirators outweighed by benefits of providing remedy against private parties who participate in subverting judicial process and in so doing inflict injury on other persons).

"save" from collateral attack arbitrators who had volunteered their services to resolve disputes yet had neglected to memorialize in writing the conditions under which they would serve, including contractual protection from such collateral attack. In today's world of finger-tip word processing and instant electronic communication, however, arbitrators and arbitral sponsoring bodies can easily obtain by contract — as a condition to their agreement to serve — all of the "immunity" they need in the form of contractual waiver, release, and a simple covenant not to sue. The AAA has done just that, and has implemented and enjoys these very protections, by contract, under its own rules. What more does it need?

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED DECEMBER 3, 2002

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 01-3270

INTERNATIONAL MEDICAL GROUP, INCORPORATED, an Indiana Corporation, and SIRIUS INTERNATIONAL INSURANCE CORPORATION, a foreign corporation,

Plaintiffs-Appellants,

v.

AMERICAN ARBITRATION ASSOCIATION, INCORPORATED, JANELLA BROWN, JOHN GERMANI, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 00 C 1020—**Sarah Evans Barker,** *Judge.*

ARGUED APRIL 15, 2002—DECIDED DECEMBER 3, 2002.

Before ROVNER, DIANE P. WOOD and EVANS, *Circuit Judges.*

ROVNER, *Circuit Judge.* International Medical Group, Inc. ("IMG") and Sirius International Insurance Corporation ("Sirius") were so displeased at being drawn into an arbitration proceeding that they sued not only the claimant who drew

them in but his lawyers, their law firm, the American Arbitration Association ("AAA") and a few hapless employees of the AAA. After this Indiana state court proceeding was removed to federal court, the district court dismissed the complaint, in part for lack of personal jurisdiction over most of the defendants and in part because of arbitral immunity, failure to state a claim upon which relief can be granted, and because AAA had been improperly joined. IMG and Sirius appeal and we affirm.

I.

Michael Ogdon, a citizen of Great Britain and resident of Florida, purchased a health insurance policy from Sirius in late 1998. Sirius, a Swedish corporation, designated IMG, an Indiana company, as the policy administrator and general underwriter. In January 1999, Ogdon received emergency medical treatment at a Florida hospital and subsequently submitted bills totaling approximately $10,000 to IMG as plan administrator. IMG investigated the claim and refused to pay any of the bills on the ground that all of the charges related to a pre-existing condition that was not covered by the policy. Ogdon filed a complaint with the Indiana Department of Insurance, alleging that his illness was not a pre-existing condition at the time the policy was issued and that denial of his claim was improper, pretextual and in bad faith. The record does not reveal how or whether the Indiana Department of Insurance resolved that claim, but eventually Ogdon requested cancellation of the policy and a return of his premium. IMG obliged by cancelling the policy as of February 25, 2000 and returning a pro rata share of the premium Ogdon had paid for the policy.

In the meantime, Ogdon, through his attorneys (Hilda Piloto and Juan Rodriguez of the firm Rodriguez & Machado, P.A.) filed a Statement of Claim and a Demand for Arbitration ("Demand") with the AAA in Miami, Florida. The insurance policy provided that certain disputes under the policy would be subject to arbitration:

> If any dispute shall arise as to the amount to be paid under this insurance (liability being otherwise admitted), such dispute shall be referred to arbitration in accordance with procedures of the American Arbitration Association. Where any dispute is by this provision referred to arbitration, the making of an award shall be a condition precedent to any right of action against the Company.

R. 1, Complaint, Ex. B, ¶ 16. The Demand named both IMG and Sirius as respondents. According to the Demand, Ogdon purchased insurance from Sirius, and IMG was the plan administrator. The Demand stated that IMG and Sirius had wrongfully refused to pay out Ogdon's claim. The AAA assigned Janella Brown as the case manager. Brown worked in the AAA's Southwest Case Management Center in Atlanta, Georgia, a facility that administered arbitrations that take place in Miami, Florida. On March 17, 2000, Brown sent a letter to Thomas Dawson, a New York lawyer that Ogdon had identified as the representative for IMG and Sirius. The letter informed Dawson that Ogdon had made a demand for arbitration, and set out preliminary procedural matters. R. 1, Complaint, Ex. H.

Dawson forwarded the letter to F. Jonathon Zusy, the general counsel for IMG located in Indiana. Zusy responded to Brown's letter on behalf of both IMG and Sirius, denying that the arbitration was authorized by the insurance contract and declining to provide any of the information requested by the AAA. He explained that the contract provided for arbitration only if liability had been admitted, and that IMG and Sirius had never admitted liability. Zusy objected to an arbitration being held in Florida or anyplace else and asked the AAA to cancel the arbitration. R. 1, Complaint, Ex. I. Brown replied by a letter addressed to Ogdon's lawyers and Dawson.[1] She requested that Ogdon respond to Zusy's letter

1. Dawson again forwarded the letter to Zusy. Zusy then sent Brown a sharp reply, telling her that he was counsel for IMG, that IMG was neither a party nor a respondent and warning Brown and the AAA that IMG reserved its right to seek damages against them if they persisted with the arbitration. He complained that Brown's "unilateral" decision to continue involving Dawson was causing IMG damages through the incurring of unnecessary attorneys' fees. R. 1, Complaint, Ex. K. Zusy's letter is curious because Dawson is named in the insurance policy as Sirius's designated agent for accepting service of process for any dispute arising out of the insurance contract. Because Sirius was named as a respondent in Ogdon's Demand, it was entirely appropriate for Brown to send a copy of any correspondence to the designated agent unless and until Sirius notified the AAA of any change in its representation. Although Zusy's original letter to the AAA purported to respond on behalf of both IMG and Sirius, Zusy identified himself only as general counsel for IMG and gave no indication that the original letter had been misdirected. Indeed, in the second letter, he identified himself solely as IMG's general counsel, which might lead a reasonable person to believe that Dawson still represented Sirius or that Sirius was now unrepresented. Moreover, if Dawson was not IMG's attorney, it is

(Cont'd)

by April 4, 2000. R. 1, Complaint, Ex. J. When Ogdon did not respond, Brown sent a letter to both Ogdon's counsel and Zusy stating that Ogdon had met the filing requirements of the AAA's rules and therefore the AAA intended to go forward with the arbitration:

> Accordingly, in the absence of an agreement by the parties or a court order staying this matter, the Association will proceed with further administration. The parties may wish to raise this issue with the arbitrator at or prior to the hearing.

R. 1, Complaint, Ex. L.

Zusy sent another letter reiterating the positions previously taken by IMG and Sirius. R. 1, Complaint, Ex. M. Ogdon's lawyers stated their belief that the dispute was subject to arbitration. R. 1, Complaint, Ex. Q. Brown wrote another letter to the parties indicating that the AAA had reviewed the various positions of the parties regarding the arbitrability of the matter and had concluded that the arbitration would

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(Cont'd)

difficult to understand how IMG would have been liable for "unnecessary attorneys' fees." Presumably Sirius, having named Dawson as its designated agent, would have been liable for any attorneys' fees incurred in the arbitration. Nonetheless, Zusy insisted that all future correspondence "to IMG" be directed to him and to no other person. The AAA thereafter sent all of its correspondence directly to Zusy alone, presumably on the theory that he was also representing Sirius. We detail this strange correspondence from Zusy only because it becomes relevant later to questions of personal jurisdiction.

proceed absent an agreement by the parties or a court order staying the proceedings. R. 1, Complaint, Ex. R. Brown repeated that the AAA could not determine issues of arbitrability and informed the parties that the arbitrator had the power to determine the existence or validity of a contract of which an arbitration clause forms a part. R. 1, Complaint, Ex. R.

Shortly thereafter, IMG and Sirius filed suit in Indiana state court, requesting a stay of the arbitration proceeding and seeking a declaratory judgment clarifying the rights and obligations of the parties under the insurance contract. They alleged abuse of process, malicious prosecution and bad-faith arbitration. Their *ex parte* request for a temporary restraining order was granted. The state court later granted Sirius and IMG's request for a preliminary injunction and entered findings on several of the matters raised in the request for declaratory relief. The AAA suspended the arbitration on learning of the state court's order. Ogdon, Piloto, Rodriguez, and the firm of Rodriguez & Machado, P.A. (collectively the "Non-AAA Defendants") removed the state court lawsuit to the federal district court. Sirius moved to dismiss all of the claims it raised against the AAA, Brown and her supervisor, John Germani (collectively the "AAA Defendants"). The district court granted that motion.

All of the defendants then moved to dismiss the remaining claims under Rules 12(b)(2) and 12(b)(6). The district court dismissed the claims against Brown and Germani, the AAA employees, because their contacts with the State of Indiana were insufficient to confer personal jurisdiction. In particular, Germani had no contacts with Indiana at all

and had merely advised Brown on how to proceed with the arbitration. Brown's only contacts with Indiana were the five letters she mailed to Zusy after Zusy insisted that all mail pertaining to the arbitration be sent to him rather than to Dawson, Sirius's registered agent in New York. The court noted that all of the correspondence related to a quasi-legal proceeding that was never intended to occur in Indiana. The court concluded that asserting personal jurisdiction over Germani and Brown in Indiana would violate the due process clause of the Fourteenth Amendment. The court therefore dismissed all claims against those two defendants.

The court next considered the AAA itself. The complaint raised three claims against the AAA. Count I sought damages for tortious actions of abuse of process, malicious prosecution and bad-faith arbitration. Count II sought preliminary and permanent injunctive relief to stay the arbitration. Count III requested a declaratory judgment specifying that the arbitration was improper and defining the rights and obligations of the parties to the insurance contract. Because the insurance contract provided that any arbitration would proceed under the AAA's own rules and procedures, the court first referred to those rules. The AAA's rules specified that neither the AAA nor any arbitrator is a necessary party in judicial proceedings relating to the arbitration. The rules also provided that neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with an arbitration conducted under the AAA's rules. The court noted that these provisions might release AAA from any liability to Sirius, but that IMG was not a party to the insurance contract and thus was not bound by the AAA's rules. The court instead dismissed Counts II and III against

the AAA because the AAA was unnecessary to the resolution of any claim directed at the propriety of arbitration and because the AAA and its agents were entitled to arbitral immunity, an extension of judicial immunity.

The district court addressed Count I as if it were comprised of three separate claims, for malicious prosecution, abuse of process and bad-faith arbitration. The court first noted that the claim of bad-faith arbitration had not been recognized by the Indiana courts or by the courts of any other jurisdiction. Because IMG failed to identify the elements of this novel cause of action and because it appeared duplicative of the other two tort claims in Count I, the court dismissed the claim for bad-faith arbitration. The court next noted that a claim for malicious prosecution was traditionally intended to provide recourse to criminal defendants who were wrongfully charged but that a parallel action existed for civil claims, wrongful use of civil proceedings. The court noted that the elements of the civil claim are substantially similar to those in the criminal context and that IMG failed to allege facts sufficient to make out two of those elements. In particular, IMG failed to allege that the AAA initiated or caused to be initiated a cause of action against IMG. Moreover, IMG could not show that the cause of action terminated in IMG's favor.[2]

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2. The elements of malicious prosecution are (1) the defendant instituted or caused to be instituted a prosecution against the plaintiff; (2) the defendant acted with malice in doing so; (3) the prosecution was instituted without probable cause; and (4) the prosecution terminated in the plaintiff's favor. *Butt v. McEvoy*, 669 N.E.2d 1015, 1017 (Ind. Ct. App. 1996). The elements of a claim for wrongful use of civil proceedings simply parallel these elements.

The court found that the claim was thus not yet ripe and dismissed it.

On IMG's abuse of process claim, the court noted that this cause of action required a showing of misuse or misapplication of process, for an end other than that which it was designed to accomplish. The "process" involved in IMG's claim was the arbitration initiated by Ogdon and the Non-AAA Defendants. The court noted that the AAA's role was analogous to that of a court clerk who has placed on the docket a case filed by a claimant. Although the AAA's rules required it to make a preliminary determination that a claim for arbitration is made pursuant to a contract authorizing arbitration, no rule or principle required the AAA to make a searching analysis of the claim's merits prior to docketing. Rather, the AAA was entitled to docket the claim and have it proceed until a judicial (or quasi-judicial) determination was made that the cause failed for lack of jurisdiction or on the merits of the claim. The court thus concluded that in the absence of process initiated or caused to be initiated by the AAA, the claim of abuse of process warranted dismissal for failure to state a claim.

The court similarly dismissed the claims against all of the Non-AAA defendants because none of those defendants had sufficient contacts with the State of Indiana to justify an exercise of personal jurisdiction over them in that state. Recall that the Non-AAA Defendants were Ogdon, his lawyers Hilda Piloto and Juan Rodriguez, and their law firm, Rodriguez & Machado, P.A. Rodriguez had the fewest contacts with Indiana, consisting only of a letter to IMG to inform the company that Ogdon would submit his claim to

arbitration if IMG refused to pay his hospital bills. The court found that contact too attenuated to serve as a basis for personal jurisdiction over Rodriguez. Piloto had more contacts with Indiana, some relating to the Florida arbitration and some relating to the filing of Ogdon's complaint with the Indiana Department of Insurance. Although Piloto's contacts relating to the arbitration were slightly more numerous than Rodriguez's, the court found that filing the Miami arbitration and mailing notices to IMG in Indiana was too attenuated to subject Piloto (or her firm) to personal jurisdiction in Indiana. The court found the filing of the administrative complaint with the Department of Insurance insufficient because that action was unrelated to the claims filed in the instant case and because the contacts were few and were qualitatively insignificant.

Finally, the court considered the claims against Ogdon himself and whether personal jurisdiction could be exerted over him in Indiana. The court noted that Ogdon was never physically present in Indiana and was fortuitously involved with that state only because Sirius selected IMG as the plan administrator. Ogdon communicated with IMG in Indiana when submitting his claim for coverage and when he requested cancellation of his policy. He also caused a complaint to be filed with the Indiana Department of Insurance. All of these contacts were unconnected to the Florida arbitration, and the district court found they were insufficient to conclude that Ogdon had purposefully availed himself of the privileges and protections of Indiana law. Because Ogdon could not reasonably anticipate being haled into court in Indiana, the court concluded that an exercise of

in personam jurisdiction over him would not comport with due process. The court therefore dismissed all claims against Ogdon. IMG and Sirius appeal.

II.

On appeal, IMG and Sirius raise three issues: (1) whether the complaint states a viable claim against the AAA and Brown; (2) whether Brown's contacts with Indiana are sufficient to establish personal jurisdiction over her in Indiana; and (3) whether the Non-AAA Defendants' contacts with Indiana are sufficient to establish personal jurisdiction over them in Indiana. Sirius asked the district court to dismiss with prejudice all of its claims against the AAA Defendants and so does not appeal those dismissals. IMG does not appeal the dismissal of all claims against Germani. Otherwise, IMG and Sirius appeal all other dismissals.

A.

We begin with the district court's dismissal of the claims against the AAA and Brown on the basis of arbitral immunity and for failure to state a claim.[3] We will affirm a dismissal under Rule 12(b)(6) only if it is clear that the plaintiffs cannot establish any set of facts that would entitle them to the relief requested. *Panaras v. Liquid Carbonic Indus. Corp.*, 74 F.3d 786, 791 (7th Cir. 1996); *Mosley v. Klincar*, 947 F.2d 1338, 1339 (7th Cir. 1991); *Gibson v. City of Chicago*, 910 F.2d

3. For the purposes of this analysis, Brown, who was acting in her capacity as an employee of the AAA, will be treated as having the same rights and liabilities as the AAA for acts taken in the scope of her duties for the AAA.

1510, 1520-21 (7th Cir. 1990). In making this assessment, we read the complaint liberally and accept as true all well-pleaded allegations and the inferences that may be reasonably drawn from them. *Panaras*, 74 F.3d at 791; *Mosley*, 947 F.2d at 1339; *Gibson*, 910 F.2d at 1520-21.

IMG argues that arbitration is a matter of contract. Because the AAA concedes that IMG was not a party to the insurance contract between Ogdon and Sirius, IMG contends that the AAA engaged in tortious conduct by asserting jurisdiction over IMG. IMG contends that arbitral immunity should not apply when the sponsoring body (in this case, the AAA) has acted in the clear absence of jurisdiction. IMG acknowledges that it was unable to find any authority defining a cause of action against an arbitrator or sponsoring organization for the harm caused when that arbitrator or organization acts in the clear absence of jurisdiction. IMG asks this Court to name this new cause of action and define its parameters. The AAA maintains that it is not a proper party to any suit regarding the arbitration and that it is protected by arbitral immunity.

The AAA does not dispute that arbitration is a matter of contract. A "party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986) (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). This is because arbitrators derive their authority to resolve disputes from the prior agreement of the parties to submit their grievances to arbitration. *AT&T*, 475 U.S. at 648-49. But it is not the responsibility of the AAA or even the

arbitrator to determine whether a particular agreement creates a duty for the parties to arbitrate a particular grievance. *AT&T*, 475 U.S. at 649. Unless the parties clearly and unmistakably provide otherwise, the question of arbitrability is to be decided by a court, not by an arbitrator. *Id.*

IMG insists that the AAA violated that principle and decided the arbitrability of the case when it purported to assert jurisdiction over IMG and attempted to move the matter forward through arbitration. Under IMG's logic, the AAA would have been deciding the arbitrability of the case no matter what it did after the Demand was filed. Once IMG objected to the arbitration, the AAA had only two choices, to proceed or not to proceed. The AAA proceeded after determining that its filing requirements had been met and after informing IMG that it could ask a court to determine the arbitrability of the matter. Indeed, the very documents IMG relies upon to show the AAA decided the arbitrability of the matter contradict its position. The AAA, through Brown, expressly declined to decide the arbitrability of the matter. After informing IMG that it would stop the arbitration if directed by a court to do so, the AAA halted the process at once when IMG obtained a state court order. Until that time, the AAA was well within its rights to proceed with the arbitration, and was acting in a manner similar to a clerk of court upon receiving a filing that complies with the court's rules.

The cases uniformly support arbitral immunity in situations such as occurred here. We have held, for example, that arbitral immunity should extend to cases where the authority of an arbitrator to resolve a dispute is challenged.

Tamari v. Conrad, 552 F.2d 778, 780 (7th Cir. 1977). In *Tamari*, the plaintiff argued that arbitrators are not entitled to immunity if they have no right to arbitrate the dispute in the first place. 552 F.2d at 780. We held that arbitral immunity should apply when the arbitrator's authority is challenged because arbitrators will be dissuaded from serving if they can be caught up in the dispute and be saddled with the burdens of defending a lawsuit. *See Jain v. deMere*, 51 F.3d 686, 688 (7th Cir. 1995), *cert. denied*, 516 U.S. 914 (1995) (noting that the Federal Arbitration Act creates a strong presumption in favor of arbitration). We noted that arbitrators have no interest in the outcome of the matter, and thus should not be compelled to become parties to the dispute. *Tamari*, 552 F.2d at 781. We found suing an arbitrator to be comparable to suing jurors when a litigant is dissatisfied with the outcome of a lawsuit. Such a suit would place an unfair burden on jurors and would discourage others from jury service. Moreover, the suit would not be necessary for a litigant to obtain relief. The composition of a jury, for example, can be challenged through appellate review of the original action. Similarly, IMG or any party to an arbitration can obtain relief by seeking a stay against the party bringing the arbitration. There is no need to seek a stay against the sponsoring organization. *Tamari*, 552 F.2d at 781. *See also New England Cleaning Servs., Inc. v. American Arbitration Ass'n*, 199 F.3d 542 (1st Cir. 1999) (sponsoring organization's immunity extends to all administrative tasks it performs and will apply unless the demand for arbitration is so deficient on its face as to signal a clear absence of jurisdiction); *Hawkins v. National Ass'n of Sec. Dealers, Inc.*, 149 F.3d 330, 332 (5th Cir. 1998) (arbitrators and sponsoring organizations are immune from civil liability arising from

actions taken in the course of conducting arbitration proceedings); *Olson v. National Ass'n of Sec. Dealers*, 85 F.3d 381, 382 (8th Cir. 1996) (a sponsoring organization is immune from civil liability for improperly selecting an arbitration panel even if the selection violates the organization's internal rules because quasi-judicial immunity applies to both sponsoring organizations and arbitrators; immunity protects decision makers from undue influence and protects the decision-making process from attack by dissatisfied litigants); *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 883 (2d Cir. 1990), *cert. denied*, 498 U.S. 850 (1990) (arbitrators in contractually agreed upon arbitration proceedings are absolutely immune from liability in damages for all acts within the scope of the arbitral process).

IMG complains that arbitral immunity does not apply here because it was never a party to a contract authorizing arbitration and the AAA therefore acted in the clear absence of jurisdiction. IMG relies on our reasoning in *Caudle v. American Arbitration Ass'n*, 230 F.3d 920 (7th Cir. 2000). Caudle sued the AAA for breach of contract because he believed the AAA was charging an unreasonably high fee to conduct an arbitration. The district court dismissed the suit after finding that the AAA was entitled to immunity. We vacated and remanded with instructions to dismiss for want of jurisdiction after determining there was no basis for Caudle to bring the suit in federal court. Before vacating on this ground, however, we discussed arbitral immunity, questioning whether the principle was properly understood as immunity rather than a conclusion that arbitrators and sponsoring organizations are not the real parties in interest. 230 F.3d at 922. We hypothesized a scenario in which the

AAA might be held liable for its actions. If Caudle had paid the entire amount requested by the AAA to conduct the arbitration and the AAA had then pocketed the money without arbitrating the dispute, we speculated that it was unlikely the AAA could claim immunity in response to a demand for a refund. *Id.* We declined to decide the issue, however, because we determined that there was no jurisdiction for Caudle to bring the case in federal court. 230 F.3d at 922.

IMG now seizes upon the *Caudle* hypothetical and argues that the AAA's assertion of jurisdiction over it when it was not a party to the insurance contract authorizing arbitration is outside the scope of arbitral immunity. IMG misses an important distinction between the *Caudle* hypothetical and the circumstances presented here. In the *Caudle* hypothetical, the facts giving rise to the potential claim have nothing to do with arbitrability or with the administrative duties of the AAA. The claim that one may not retain a payment for services that are never rendered can be stated entirely without reference to the arbitration. Here, however, the claim is integrally related to the administrative tasks of the AAA, as noted previously, similar to the administrative tasks of a court clerk accepting a complaint for filing. *See Tamari*, 552 F.2d at 780 (arbitral immunity should extend to cases where the authority of the arbitrator to resolve a dispute is challenged); *New England Cleaning Servs.*, 199 F.3d at 545 (a sponsoring organization's immunity extends to the administrative tasks it performs, insofar as these are integrally related to the arbitration). The appropriate remedy for an administrative mistake by the AAA (and we are not finding here that the AAA erred in accepting the demand and proceeding with the arbitration) would be for the wronged

party to seek injunctive relief against the party initiating the arbitration in an appropriate court. The AAA need not be a party to that action and should be spared the burden of litigating the appropriateness of its exercise of jurisdiction.

Because we are holding that AAA is immune from a suit based on wrongful exercise of jurisdiction, we need not explore the parameters of the new cause of action IMG seeks to define.[4] Moreover, we agree with the district court that IMG has failed to state a claim for abuse of process, malicious prosecution and bad-faith arbitration (a claim that IMG concedes has never been recognized by any court). *See International Med. Group, Inc. v. American Arbitration Ass'n*, 149 F. Supp.2d 615, 629-32 (N.D. Ill. 2001). For the claim of malicious prosecution, a plaintiff must show, among other things, that the prosecution terminated in the plaintiff's favor. *Hammond Lead Prods., Inc. v. American Cyanamid Co.*, 570 F.2d 668, 673 (7th Cir. 1977). IMG cannot show that the arbitration terminated in its favor and thus the arbitration may not serve as the basis of a malicious prosecution claim. Similarly, to make out a claim for abuse

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4. Our holding that the AAA is entitled to immunity applies to Count I of IMG's complaint. Count I seeks damages for tortious actions including malicious prosecution, abuse of process and "bad-faith arbitration," a cause of action coined by IMG. Counts II and III seek preliminary and permanent injunctive relief directed at staying the arbitration and a declaratory judgment specifying that the arbitration is improper and defining the rights of the parties under the insurance contract. The AAA is obviously not a real party in interest to Counts II and III, and therefore the district court properly dismissed those claims against the AAA under Rule 17(a). IMG could obtain all of the relief it seeks in Counts II and III in its claims against the Non-AAA Defendants.

of process, IMG must show "a wilful act in the use of the process not proper in the regular conduct of the proceedings." *Groen v. Elkins*, 551 N.E.2d 876, 878 (Ind. Ct. App. 1990). IMG's pleadings reveal that Ogdon, not the AAA, initiated the arbitration process and that the AAA did nothing more than docket a properly filed demand for arbitration. We have already established that only the courts may decide issues of arbitrability and so the AAA did not abuse the process when it declined IMG's invitation to determine that the arbitration should not go forward. In sum, the AAA neither initiated nor caused to be initiated any process at all, and thus cannot be held liable for abuse of process. *International Med. Group*, 149 F. Supp. 2d at 632. Bad-faith arbitration is the name coined by IMG for the new cause of action it asks us to recognize and define. As we explained above, however, the AAA enjoys immunity from suit in these circumstances and we thus decline to recognize or define this new action. We therefore affirm the district court's dismissal of all claims against the AAA and Brown.

B.

That brings us to the claims against the Non-AAA Defendants. The district court dismissed these claims because it lacked personal jurisdiction over these defendants. The Non-AAA Defendants are Ogdon, his lawyers Piloto and Rodriguez, and their law firm Rodriguez & Machado, P.A. The question of whether the court had personal jurisdiction over Ogdon's lawyers and their law firm is not a close call and we summarily affirm the district court's finding that an exercise of personal jurisdiction over the lawyers and law firm does not comport with due process. Rodriguez mailed a

single letter to IMG in Indiana, informing the company that Ogdon intended to submit his claim to arbitration if IMG did not cover it. Piloto had a few more contacts with the state of Indiana. She copied IMG on correspondence with the AAA in connection with the arbitration. She also filed a complaint for Ogdon with the Indiana Department of Insurance. As the district court pointed out, all of these actions were at most tangentially related to the arbitration that is the subject of the current dispute and are insufficient to establish personal jurisdiction over Piloto. The law firm acted only through Piloto and Rodriguez and these few contacts are similarly insufficient to establish personal jurisdiction over the law firm. We affirm the dismissal of the claims against Ogdon's lawyers and their law firm for lack of personal jurisdiction.

The issue of personal jurisdiction over Ogdon in Indiana is somewhat of a closer call. Ogdon's contacts with the State of Indiana are more extensive than any of the other Non-AAA Defendants. The actions of Ogdon's attorneys on his behalf in Indiana are attributable to Ogdon for the purposes of personal jurisdiction analysis. As we have already discussed, those contacts alone are insufficient to subject the attorneys or Ogdon to personal jurisdiction in Indiana. Ogdon was never physically present in Indiana. As the district court noted, his contacts with Indiana were due to Sirius's selection of IMG as plan administrator of the insurance policy. IMG underwrote the policy and Ogdon communicated with IMG in Indiana when he submitted claims for coverage and when he requested that his policy be cancelled. Ogdon purchased the policy when he was a resident of Canada, and the medical care for which he sought coverage was rendered in Florida.

Appendix A

We review dismissals for lack of personal jurisdiction *de novo*. *Central States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 939 (7th Cir. 2000), *cert. denied*, 532 U.S. 943 (2001). To determine whether personal jurisdiction exists, we look first to Indiana's long-arm statute. *Wallace v. Herron*, 778 F.2d 391, 393 (7th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986). Indiana's statute requires a two-prong analysis. *Anthem Ins. Cos., Inc. v. Tenet Healthcare Corp.*, 730 N.E.2d 1227, 1232 (Ind. 2000); Indiana Trial Rule 4.4(A). First, the court must determine whether the defendant's contacts with Indiana come within the statute's "enumerated act" scheme. If they do, the court must also determine whether the defendant's contacts with the State satisfy federal due process concerns. *Anthem Ins.*, 730 N.E.2d at 1232. Ogdon concedes that his contacts with Indiana satisfy the first prong of the Indiana analysis, and we therefore focus on whether his contacts with Indiana are sufficient for due process purposes.

In order for personal jurisdiction to be proper, a defendant must have established minimum contacts with the forum state. *Central States*, 230 F.3d at 934 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-76 (1985)). The crucial inquiry is whether the defendant's contacts with the state are such that he should reasonably anticipate being haled into court there. *Burger King*, 471 U.S. at 474; *Central States*, 230 F.3d at 943. The defendant must have purposefully availed himself of the privilege of conducting activities in the forum state, invoking the benefits and protections of its laws. *Burger King*, 471 U.S. at 474-75; *Central States*, 230 F.3d at 943. Once minimum contacts have been shown, we must examine other factors, such as the forum's interest in

adjudicating the dispute and the burden on the defendant of appearing in the forum, in order to determine whether the exercise of personal jurisdiction satisfies traditional notions of fair play and substantial justice. *Burger King*, 471 U.S. at 476-77; *Central States*, 230 F.3d at 943.

A defendant's contacts with a forum state may be related or unrelated to the facts forming the basis for the lawsuit. *See Anthem Ins.*, 730 N.E.2d at 1234. Contacts related to the subject matter of the lawsuit may give rise to specific personal jurisdiction, that is, jurisdiction over the person for a case arising from those contacts. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984); *Anthem Ins.*, 730 N.E.2d at 1234. When the contacts with the forum state are unrelated to the subject matter of the lawsuit, general personal jurisdiction may be established if the defendant's contacts are so continuous and systematic that the defendant could reasonably foresee being haled into court in that state for any matter. *Helicopteros*, 466 U.S. at 414-15; *Anthem Ins.*, 730 N.E.2d at 1234. IMG's brief does not specify whether it believes the court has specific or general personal jurisdiction over Ogdon and we will therefore consider both avenues in our analysis.

All three counts of the complaint relate solely to the arbitration. Count I seeks damages for malicious prosecution, abuse of process and bad-faith arbitration, as we discuss above. Count II seeks injunctive relief directed at staying the arbitration proceedings. Count III seeks declaratory relief, again related to the arbitration. Yet Ogdon had very limited contacts with the State of Indiana in relation to the arbitration. On January 28, 2000, Ogdon's attorneys sent a letter to IMG

in Indiana threatening to pursue arbitration if IMG did not immediately pay Ogdon's claims. Ogdon's attorneys served notice of the demand for arbitration on Sirius's New York counsel as identified in the insurance policy. Only after IMG insisted that further notices be sent to it in Indiana did the AAA send arbitration-related correspondence to IMG in Indiana. Indeed, the only other contacts Ogdon had with IMG in Indiana related to the arbitration were two letters Piloto sent to the AAA, with courtesy copies sent to IMG. Ogdon could not have reasonably anticipated being haled into court in Indiana of the basis of these three letters. Moreover, two of the letters were sent to Indiana only after IMG requested that correspondence be directed there, leading us to conclude that an exercise of specific personal jurisdiction over Ogdon would not comport with substantial justice and fair play.

We turn then to the question of whether Ogdon's contacts with Indiana were of such a continuous and systematic nature as to subject him to general personal jurisdiction in that State. Ogdon sought insurance with Sirius, a foreign corporation having a registered agent in New York. Sirius selected IMG as its plan administrator, and as the district court pointed out, all of Ogdon's contacts with Indiana occurred as a result of Sirius's selection of IMG. Ogdon's Florida insurance agent submitted his application for insurance with Sirius to IMG. Ogdon submitted his medical bills for payment to IMG, and when IMG declined to pay, Ogdon's attorneys sent a letter to IMG demanding payment and threatening arbitration. Ogdon also filed a complaint with the Indiana Department of Insurance, and requested cancellation of his policy and a refund of premium through IMG. As we detailed above, Ogdon's attorneys also sent copies of two letters addressed to the AAA to IMG's attorney in Indiana.

These contacts with the State of Indiana are too attenuated to establish general personal jurisdiction over Ogdon in Indiana. As the district court noted, all of the contacts are due to Sirius's selection of IMG as plan administrator. Recall that to establish general personal jurisdiction, a defendant's contacts with a forum must be so continuous and systematic that the defendant could reasonably foresee being haled into court there on *any* matter. We also agree with the district court that Indiana's connection to the subject matter of this lawsuit is at best tenuous. Ogdon did not purposefully avail himself of the privileges and protections of Indiana law; rather Sirius purposefully involved IMG in the transaction that ultimately led to the lawsuit. Ogdon could not reasonably anticipate being haled into court in Indiana to defend a lawsuit based on these relatively few attenuated contacts with the State. *See Wallace*, 778 F.2d at 394-95; *Anthem Ins.*, 730 N.E.2d at 1234-35 (contacts must be substantial, continuous and systematic to sustain general personal jurisdiction); *Hotmix & Bituminous Equip., Inc. v. Hardrock Equip. Corp.*, 719 N.E.2d 824, 830 (Ind.Ct.App.1999) (where nonresident who had never been in Indiana engaged in numerous phone calls, letters and fax transmissions with Indiana regarding property located in another state, contacts insufficient to confer personal jurisdiction). We therefore affirm the district court's dismissal of all claims against Ogdon for lack of personal jurisdiction.

Appendix A

III.

For the reasons stated above, we affirm the dismissal of all remaining claims against both the AAA Defendants and the Non-AAA Defendants.

AFFIRMED.

A true Copy:

Test:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION DATED JULY 26, 2001.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IP 00-1020-C-B/S

INTERNATIONAL MEDICAL GROUP, INC., an Indiana Corporation, and SIRIUS INTERNATIONAL LIFE INSURANCE CORPORATION (publ), a Foreign Corporation,

Plaintiffs,

vs.

AMERICAN ARBITRATION ASSOCIATION, JANELLA BROWN, JOHN GERMANI, JUAN J. RODRIGUEZ, HILDA PILOTO, RODRIGUEZ & MACHADO, P.A., and MICHAEL OGDON,

Defendants.

JUDGMENT

In accord with the two Entries issued in this cause, the first on May 25, 2001, and the second on this date, Plaintiffs' claims are hereby Dismissed and Judgment is entered in favor of Defendants, American Arbitration Association, et al., and

against Plaintiffs, International Medical Group, Inc., and Sirius International Insurance Corporation.

It is so ORDERED this 26th day of July 2001.

s/ Sarah Evans Barker
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

APPENDIX C — ENTRY GRANTING DEFENDANTS' MOTION TO DISMISS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION DATED MAY 25, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IP 00-1020-C-B/S

INTERNATIONAL MEDICAL GROUP, INC., an Indiana Corporation, and SIRIUS INTERNATIONAL LIFE INSURANCE CORPORATION (publ), a Foreign Corporation,

Plaintiffs,

vs.

AMERICAN ARBITRATION ASSOCIATION, JANELLA BROWN, JOHN GERMANI, JUAN J. RODRIGUEZ, HILDA PILOTO, RODRIGUEZ & MACHADO, P.A., and MICHAEL OGDON,

Defendants.

ENTRY GRANTING DEFENDANTS' MOTION TO DISMISS

Appendix C

Procedural Background

Plaintiffs, International Medical Group, Inc. ("IMG") and Sirius International Insurance Corporation ("Sirius"), filed suit in Indiana state court requesting that the court issue an ex parte temporary restraining order ("TRO") with regard to an arbitration proceeding entitled *Michael D. Ogdon, Claimant v. International Medical Group, Inc., Respondent*; American Arbitration Association Case No. 32-193-00084-00 (the "Arbitration Proceeding"). Plaintiffs sought preliminary and permanent injunctive relief to prevent the Defendants, American Arbitration Association ("AAA"), Janella Brown ("Brown"), John Germani ("Germani") (collectively the "AAA Defendants"), Juan J. Rodriguez ("Rodriguez"), Hilda Piloto ("Piloto"), Rodriguez & Machado, P.A. ("R & M"), and Michael Ogdon ("Ogdon") (collectively the "Non-AAA Defendants"), from proceeding with the Arbitration Proceeding, requested declaratory relief with respect to the Arbitration Proceeding and the insurance policy at issue herein, and alleged abuse of process, malicious prosecution and bad faith arbitration. After the state court granted Plaintiffs' requests for preliminary injunctive relief, the action was removed to federal court.[1]

We now consider the AAA Defendants' motion to dismiss the complaint, pursuant to Federal Rule of Civil Procedure 12(b)(2) and 12(b)(6), for lack of personal jurisdiction and for failure to state a claim upon which

---

1. Plaintiffs' motion to remand the matter to state court has been denied.

relief may be granted.[2] Specifically, the Defendants allege that there is no personal jurisdiction over Brown and Germani and that jurisdiction is lacking over the AAA because it is an unnecessary defen-dant, whose presence is tangential to plaintiffs' claims for relief. Furthermore, they contend that the AAA Defendants enjoy arbitral immunity against the claims raised in the complaint, but that even if such immunity does not exist, the complaint lacks the factual basis necessary to support the three substantive claims asserted. For the reasons explicated below, we *GRANT* the AAA Defendants' motion to dismiss in its entirety.

Factual Background

A. The Insurance Policy

Defendant, Michael Ogdon ("Ogdon") (a citizen of Great Britain and an alien admitted to the United States for permanent residence, residing in Florida), purchased a global health insurance policy on or about November 14, 1998, issued by Plaintiff, Sirius (a Swedish Corporation, with offices in Stockholm, Sweden, and London, England), and designating Plaintiff, IMG (an Indiana corporation, with offices in Indianapolis), as the policy administrator and general underwriter. *See* Compl. in *Int'l Med. Group, Inc. v. American Arbitration Ass'n*, No. 49D02-0005-CP-736, Marion County, Indiana Superior Court ("State Complaint")

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2. All claims brought by Sirius against the AAA Defendants were dismissed with prejudice on July 18, 2000. Thus, the motion before the court concerns only the claims brought by IMG against the AAA Defendants.

¶¶ 13, 14; *id.*, Exs. A, Global Medical Insurance contract, signed by Michael Ogdon, and dated Sept. 4, 1998 ("Ins. Policy"), and B, Declaration of Insurance for Michael D. Ogdon, effective Nov. 4, 1998, Certificate No. 1B98-70484 ("Ins. Dec.") at 1, ¶ A. The policy provides coverage for all services, supplies, treatments or conditions resulting from an illness or injury, except that it excluded from coverage any pre-existing medical conditions for the first two years and limited coverage of such conditions thereafter. Ins. Policy at 3; Ins. Dec. ¶ K(1); State Complaint ¶¶ 16, 17.

With respect to legal proceedings concerning the policy, it provides that:

> (6) *SERVICE OF SUIT* — It is agreed that in the event of the failure of the Company[3] to pay any amount claimed to be due hereunder, the Company, at the request of the Insured Person, will submit to the jurisdiction of a Court of competent jurisdiction with the United States. Nothing in this clause constitutes or should be understood to constitute a waiver of the Company's rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any state in the United States.

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3. The Insurance Policy refers to Sirius as the Company and to IMG as the Plan Administrator. Ins. Dec. ¶ A.

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> In any suit instituted against the Company upon this agreement, the Company will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.
>
> . . .
>
> (16) If any dispute shall arise as to the amount to be paid under this insurance (liability being otherwise admitted), such dispute shall be referred to arbitration in accordance with procedures of the American Arbitration Association. Where any dispute is by this provision referred to arbitration, the making of an award shall be a condition precedent to any right of action against the Company.

Ins. Dec. ¶¶ B(6), (16).

B. The Events Surrounding the Arbitration

On or about January 18, 1999, Ogdon allegedly received "emergency medical treatment" at a Florida hospital and, pursuant to the terms of his policy, submitted bills approximating $10,000 to Sirius, through IMG as plan administrator, requesting payment. State Compl. ¶¶ 18-19. After conducting an investigation and examining Ogdon's medical bills, IMG, for and on behalf of Sirius, denied the claim and refused to issue any payment, contending that all bills related to his treatment resulted from a pre-existing condition. *Id.* ¶ 20.

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On or about January 31, 1999, Ogdon, by his attorneys (Defendants, R & M, through Rodriguez and Piloto), filed a complaint with the Indiana Department of Insurance, Consumer Services Division, in Indianapolis, alleging in relevant part that the January 1999, illness was not a pre-existing condition at the time of entering into the Insurance Policy contract, and further that Plaintiffs' denial of said claim was improper, pretextual, and in bad faith. State Compl. ¶ 21, Ex. C. IMG replied to this charge on February 17, 2000, denying it in full. *Id.* ¶ 23. Neither Sirius nor IMG ever admitted any liability under the Insurance Policy for these claims. *Id.* ¶ 20.

On February 25, 2000, Ogdon requested both verbally and in writing that IMG cancel the Insurance Policy and that the prorated premium be refunded. *Id.* ¶ 25, Ex. D. The policy provided that cancellation occurred at the option of IMG; IMG exercised this option on March 12, 2000, effective February 25, 2000, credited Ogdon's credit card account in the amount of $602.57, and informed Ogdon in writing that "[a]ll rights under this Certificate have been forfeited." *Id.* ¶ 26, Exs. E, F.

After notifying Plaintiffs of his desire to cancel the policy, but before Plaintiffs consented to its cancellation, on or about March 6, 2000, Ogdon's attorneys prepared a Statement of Claim and a Demand for Arbitration which were filed with Defendant, the American Arbitration Association ("AAA"). State Compl. ¶ 27, Ex. G. Ogdon and his attorneys contended that this claim and demand were authorized by the arbitration provision contained in Section B(16) of the Insurance Declaration.

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Upon receiving Ogdon's claim, the AAA assigned Defendant Brown as the case manager and on March 17, 2000, Brown notified Thomas Dawson of the law firm of LeBoeuf, Lamb Greene & MacRae, L.L.P. (whom paragraph B(6) of the Insurance Policy designated as Sirius' agent for purposes of service) of the request for arbitration which had been filed and "laid out" preliminary procedural matters. State Compl., Ex. H. On March 29, 2000, F. Jonathan Zusy, Vice President and General Counsel for IMG, responded to Brown's letter denying that the arbitration was authorized by the Insurance Policy and disputing the AAA's authority to proceed with the arbitration; IMG specifically objected to the arbitration proceedings and requested notification that the proposed arbitration had been withdrawn. State Compl., Ex. I. The next day, Brown, on behalf of the AAA, sent another letter to Dawson acknowledging the receipt of IMG's letter and placing Ogdon on notice that any response to IMG's letter was to be received on or before April 4, 2000. State Compl., Ex. J.

Once again, Dawson forwarded Brown's letter to IMG and Zusy responded, instructing Brown to direct further communications to him and reiterating IMG's position that the arbitration was unauthorized and non-consensual. State Compl., Ex. K. Thereafter, Brown directed correspondence to Zusy (in Indiana).

On April 7, 2000, Brown notified Ogdon (through his attorney) and IMG (through Zusy) that:

> The Association has carefully reviewed the positions and contentions of the parties as set forth

> in their correspondence. The claimant has met the filing requirements of the rules by filing a demand for arbitration providing for administration by the American Arbitration Association under its rules.
>
> Accordingly, in the absence of an agreement by the parties or under a court order staying this matter, the Association will proceed with further administration. The parties may wish to raise this issue with the arbitrator at or prior to the hearing.

State Compl., Ex. L. Zusy responded five days later requesting that Brown: (1) forward to him all "comments" received by AAA from Ogdon; (2) provide the names and title of all AAA employees who had reviewed Ogdon's claim and the comments received by AAA; (3) provide the names and titles of all employees who participated in the AAA's conclusion that Ogdon had met the AAA's filing requirements; (4) identify the legal and factual basis for the AAA's conclusion that it had the authority, control, or other personal jurisdiction over IMG; and (5) indicate whether the AAA intended to profit or "otherwise receive any value or benefits" from the proposed arbitration. State Compl., Ex. M.

Despite the April 7, 2000, letter from Brown stating that the AAA had "carefully reviewed the positions and contentions of the parties," Brown sent another request to Ogdon and IMG on April 14, 2000, noting that Ogdon had not responded to IMG's position on the dispute's arbitrability and informing him that unless he responded on or before April 19, 2000, the AAA would "assume that Claimant is in agreement with Respondent's position and we will close our

file in the above matter." State Compl., Ex. N. After the AAA granted Ogdon a one-day extension, he responded that he did not share IMG's and Sirius' view that the dispute fell outside the Insurance Policy's arbitration provisions. Thereafter, on May 10, 2000, Brown once again wrote the parties and told them:

> The Association has reviewed the parties' contentions regarding the arbitrability of this matter. Please refer to our letter dated April 7, 2000 that indicates the Association will proceed forward in this matter in the absence of an agreement by the parties or a court order staying this matter.
>
> The Association cannot determine issues of arbitrarily [sic]. In accordance with R-8(b) of the Rules, the arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part.
>
> The Association is proceeding with this matter in accordance with R-2 of our Rules, and my supervisor, John Germani, assisted in this decision.

State Compl., Ex. R. That same day, Brown sent the parties a list of potential arbitrators from which the panel for the arbitration were to be chosen.

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On May 22, 2000, Plaintiffs filed a claim in Indiana state court, requesting a temporary restraining order as well as preliminary and permanent injunctive relief directed at stopping the arbitration proceedings, seeking a declaratory judgment clarifying the rights and obligations contained in the insurance policy, and claiming damages resulting from the Defendants' alleged abuse of process, malicious prosecution and bad faith arbitration. *See* State Compl. That same day, Plaintiffs' ex parte request for a temporary restraining order was granted and on May 31, 2000, the Marion County Superior Court granted Plaintiffs' request for preliminary injunctive relief and certain of Plaintiffs' requests for declaratory relief with respect to the Arbitration Proceedings and the subject insurance policy.

The AAA Defendants' motion to dismiss raises both jurisdictional and merit-based defenses. They first contend that minimum contacts sufficient to constitutionally establish personal jurisdiction over Defendants Brown and Germani are lacking and that there is no personal jurisdiction over the AAA because it is not a necessary party to a suit related to the administration of arbitration and that full relief on the merits can be granted in this case without the AAA as a party. Next, the AAA Defendants contend that the Complaint fails to adequately state a claim upon which relief may be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), with respect to all of the individual claims. Finally, the AAA contends that, even if the complaint makes out a cognizable claim, the AAA Defendants are entitled to arbitral immunity. We shall address each issue *seriatim*.

Appendix C

Discussion

A. Standard of Review

B. Rule 12(b) Standard of Review

Federal Rule of Civil Procedure 12(b)(2) permits the dismissal of a claim for "lack of jurisdiction over the person" and Rule 12(b)(6) permits the dismissal of a claim for "failure to state a claim upon which relief may be granted." *See* FED. R. CIV. P. ("Rule") 12(b)(2), (6). When considering a motion under Rule 12(b), the Court must examine the sufficiency of the plaintiff's complaint, not the merits of the lawsuit. *See Gibson v. City of Chicago*, 910 F.2d 1510, 1520-21 (7th Cir. 1990); *Triad Assocs., Inc. v. Chicago Housing Auth.*, 892 F.2d 583, 585 (7th Cir. 1989), *abrogated on other grounds by Board of County Comm'rs, v. Umbehr*, 518 U.S. 668 (1996). Dismissal is appropriate only if it appears to a certainty that the plaintiff cannot establish any set of facts which would entitle her to the relief sought. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Mosley v. Klincar*, 947 F.2d 1338, 1339 (7th Cir. 1991). To survive a motion to dismiss, a complaint must contain either "direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory. . . . But such allegations need only state a possible claim, not a winning claim." *Herdrich v. Pegram*, 154 F.3d 362, 369 (7th Cir. 1998), *rev'd on other grounds*, 530 U.S. 211 (2000).

We accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff. *Dawson v. Gen. Motors Corp.*, 977 F.2d 369, 372 (7th Cir.

1992); Rule 8(a). However, "a complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)." *Panaras v. Liquid Carbonic Indus. Corp.*, 74 F.3d 786, 792 (7th Cir. 1996) (quoting *Palda v. Gen. Dynamics Corp.*, 47 F.3d 872, 875 (7th Cir. 1995)). In considering a motion to dismiss under Rule 12(b)(2), we may also consider affidavits and other documentary evidence which have been filed, so long as any factual disputes are resolved in favor of the non-movant. *McIlwee v. ADM Indus., Inc.*, 17 F.3d 222, 223 (7th Cir. 1994); *Nelson v. Park Indus., Inc.*, 717 F.2d 1120, 1122 (7th Cir. 1983).

C. Lack of Personal Jurisdiction

1. Minimum contacts of Brown and Germani

The AAA Defendants' first argument is that Indiana's long-arm statute does not allow us to exercise personal jurisdiction over Defendants Brown and Germani. Courts have traditionally interpreted Indiana's long-arm statute as extending personal jurisdiction of courts in Indiana, including federal courts, to the limits permitted under the due process clause of the Fourteenth Amendment. *E.g.*, *Wallace v. Herron*, 778 F.2d 391, 392 (7th Cir. 1985); *Intermatic, Inc. v. Taymac Corp.*, 815 F. Supp. 290, 292 (S.D. Ind. 1993). However, the Indiana Supreme Court recently explained that the statute is more properly considered as an "enumerated acts" statute which requires the court to engage in a two-step process in order to determine whether it has jurisdiction over the parties to the case: first, the court must determine whether the defendant's contacts with the forum fall under the listed acts

found in the long-arm statute; and secondly, if they do, the court must determine whether the defendant's contacts satisfy federal due process standards. *Anthem Ins. Cos. v. Tenet Healthcare Corp.*, 730 N.E.2d 1227, 1232 (Ind. 2000). Despite the Indiana Supreme Court's direction that we engage in the two-step analysis, IMG rightly notes that the AAA Defendants do not challenge the fact that first step is met here; instead, they skip to the second step and dispute whether there exist minimum contacts sufficient to allow the constitutional exercise of jurisdiction over the defendants.[4] Thus, while we acknowledge that Indiana's highest court has identified this long-arm statute as an "enumerated acts" statute, we follow the parties' lead and proceed directly to the constitutional issues raised herein.

Due process requires that a defendant have "certain minimum contacts with the forum such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Wallace*, 778 F.2d at 393 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). A court may obtain *in personam* jurisdiction over a defendant based upon either the defendant's general contacts with the forum (i.e., "sufficient 'continuous and systematic general . . . contacts' with the State") or the defendant's specific contacts with the forum, where the controversy itself " 'is

4. Although the Defendants' Reply brief identifies the rule's language to the effect that jurisdiction is authorized "as to any actions arising from the following acts committed by him or her . . . [,]" they do so in the context of discussing which contacts are rightly considered by the court in ascertaining whether the constitutional requirement has been met, not whether the conduct alleged falls under one of the long-arm statute's "enumerated acts."

related to or arises out of the defendants' contacts with the forum.' " *Id.* (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (internal quotation marks omitted)).

IMG does not contend that the contacts of Defendants Brown and Germani are of such a "continuous and systematic" nature such that general jurisdiction is warranted in this matter. Any such contention would be contrary to the undisputed facts before us, as both Brown and Germani have filed affidavits with the court affirming that the only contacts either party has had with Indiana are limited to the correspondence detailed above. *See* Brown Aff. and Brown Suppl. Aff.; Germani Aff. and Germani Suppl. Aff. These isolated letters are plainly insufficient to confer general jurisdiction over either of them.

Turning to the question of whether "specific jurisdiction" is warranted here, we note that the question of whether minimum contacts exist is one to be determined on a case-by-case basis. *Kulko v. Superior Court of Cal.*, 436 U.S. 84, 92-93 (1978); *Anthem Ins. Cos.*, 730 N.E.2d at 1235. While a single contact with a forum state may be enough to establish specific personal jurisdiction over the defendant, the contacts still must be such that they "create a 'substantial connection' with the forum state and the suit is based on [those] connections." *Anthem Ins. Cos.*, 730 N.E.2d at 1235 (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)). "The defendants' conduct and connection with Indiana must be such that they should reasonably anticipate being subject to the jurisdiction of an Indiana court." *Wallace*, 778 F.2d at 393-94 (citing

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)). When assessing whether specific jurisdiction exists, the court must examine "the quality and nature of the activities taking place within the state to determine if they are related to the basis of the lawsuit and the result of deliberate conduct by the defendant." *Anthem Ins. Cos.*, 730 N.E.2d at 1236.

Indiana courts have enumerated five factors to be considered in determining whether fair play and substantial justice would be served by a finding that jurisdiction is proper in a given case:

> (1) the nature and quality of the contacts with the forum state; (2) the quantity of contacts with the state; (3) the relationship between those contacts and the cause of action; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties. . . . The first three are the primary factors in determining whether the *International Shoe* standards are met.

Baseball Card World, Inc. v. Pannette, 583 N.E.2d 753, 755 (Ind. Ct. App. 1991) (quoting *Tietloff v. Lift-A-Loft Corp.*, 441 N.E.2d 986, 989 (Ind. Ct. App. 1982)); *accord D'Iorio v. D'Iorio*, 694 N.E.2d 775, 778 (Ind. Ct. App. 1998). In this analysis, each defendant's contacts with Indiana must be assessed separately. *E.g.*, *Mullen v. Cogdell*, 643 N.E.2d 390, 398 (Ind. Ct. App. 1994) (citing *Rush v. Savchuk*, 444 U.S. 320, 332 (1980)).

With these standards in mind, it is clear that any exercise of jurisdiction over Germani would be unconstitutional. Germani has had absolutely no contact with Indiana. His sole relationship to this litigation is as Brown's supervisor who "assisted" Brown in reaching the conclusion that the AAA should proceed with instituting the arbitration proceedings. Moreover, Germani states that the AAA's Chicago or Dallas office and not its Atlanta office, out of which he and Brown are based, normally handles Indiana-based arbitrations. In the absence of any contacts with Indiana, the due process clause " 'does not contemplate that a state may make a binding judgment . . . against an individual. . . .' " *Rush*, 444 U.S. at 332-33 (quoting *Int'l Shoe Co.*, 326 U.S. at 319). Thus, the motion to dismiss the claims against Germani for lack of personal jurisdiction is granted.

As for Brown, her contacts with Indiana consist of five letters she wrote to IMG which were sent to Zusy and two additional letters she sent to LeBoeuf, Lamb Greene & MacRae, L.L.P. in New York. Even if we consider all seven of these letters, they do no more than attempt to administer the procedures implemented by the AAA once Ogdon filed the claim for arbitration purportedly authorized by the terms of the Insurance Policy. Brown's letters do nothing more than notify IMG of the claim filed against it, request comments relating to IMG's contention that the arbitration is unauthorized, indicate the AAA's position that the arbitration must proceed, clarify the AAA's position that it does not review issues of arbitrability, and provide the parties with a list of potential arbitrators. The "limited use of communication devices in interstate commerce will not automatically subject a non-resident defendant to personal jurisdiction in

some other state. The courts have uniformly held that something more is required." *Reliable Tool & Mach. Co. v. U-Haul Int'l, Inc.*, 837 F. Supp. 274, 281 (N.D. Ind. 1993) (and cases cited therein); *see also Cote v. Wadel*, 796 F.2d 981, 984 (7th Cir. 1986) (holding that a handful of letters and phone calls are insufficient to establish specific jurisdiction over a defendant under Wisconsin's long-arm statute).

The facts of the case at bar are analogous to those which the Seventh Circuit confronted in *Wallace v. Herron*, *supra*. In *Wallace*, the plaintiffs sued three California attorneys and a California law firm for malicious prosecution arising out of a prior lawsuit in California in which the attorneys represented a couple who sued a number of parties including the plaintiff. The Seventh Circuit held that the attorneys' actions of serving interrogatories, requesting the production of documents, and causing the plaintiffs to respond to five complaints in the California lawsuit were insufficient to confer jurisdiction over the attorneys. *Id.* at 394. "The fact of the matter . . . is that the defendants filed these motions on behalf of their clients in a California court pursuant to a California lawsuit, and it would be unreasonable to require the defendants to appear in Indiana to defend this suit on the basis of such attenuated contacts." *Id.*

Like the *Wallace* defendants, Brown's actions of engaging in the correspondence at issue herein were taken with respect to a quasi-legal proceeding that was not intended to occur in Indiana. If anything, Brown's correspondence was less purposefully directed than the actions of the *Wallace* defendants in that her letters were simply intended to inform IMG of the proceedings which had been initiated in another

forum. IMG's claims against Brown stem from her alleged attempt to assert arbitral jurisdiction over IMG (on behalf of the AAA) for a Florida-based proceeding. These communications are clearly ancillary to that action. IMG has given us no reason to disregard or question the averments contained in Brown's two affidavits and we therefore conclude that it would violate the due process clause of the Fourteenth Amendment for an Indiana court to exercise *in personam* jurisdiction over Brown. The motion to dismiss the claims against Brown for lack of personal jurisdiction is granted.

2. The AAA as a necessary party

The only claims remaining for our consideration are against the AAA itself. The AAA first contends that we lack personal jurisdiction over it because it is not a "necessary party" to this litigation; alternatively, the AAA asserts that it enjoys "arbitral immunity" with respect to all of the claims against it and should therefore be dismissed. In evaluating this argument, we must distinguish among the various claims brought by IMG against the Defendants (including the AAA). Count I seeks damages for alleged tortious actions: abuse of process, malicious prosecution and bad faith arbitration, Count II seeks preliminary and permanent injunctive relief directed at staying the proposed arbitration, and Count III requests a declaratory judgment specifying that the proposed arbitration is improper and defining the rights of the parties to the Insurance Policy.

First, we note that the Insurance Policy states that any arbitration initiated pursuant to paragraph B(16) will proceed

pursuant to the AAA's own rules and procedures, which include the following relevant provisions:

> (b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary party in judicial proceedings relating to the arbitration.
>
> . . .
>
> (d) Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules.

Mot. to Dismiss of AAA Defendants, Brown Aff., Ex. 1, American Arbitration Association, Commercial Dispute Resolution Procedures (Including Mediation and Arbitration Rules), as amended and effective on January 1, 1999, R-50(b), (d). By agreeing to abide by these rules, the parties to the Insurance Policy and Declaration have tacitly agreed that the AAA is not a necessary party to any litigation about the arbitration and have in advance released the AAA from any liability related to actions or omissions in connection with an arbitration. One could reasonably conclude that these agreements alone suffice to preclude a claim against the AAA relating to an arbitration (including one alleging tortious actions) and would warrant dismissal of the claims against the AAA. However, we note that the rights and obligations contained in the Insurance Declaration are explicitly directed to the "Company" (defined to be Sirius) and not the "Plan Administrator" (defined to be IMG). Indeed, IMG disputes

that it is a party to the Insurance Policy and has so contended from the outset.[5] Moreover, the intended scope of the release contained in R-50(d) is an issue of fact that cannot be determined on the motion before the court at this time.

If we sidestep the AAA's Rules and turn to the merits of the AAA's alternative substantive arguments, the characterization of the AAA as an "unnecessary party" is not foreign to the courts. However, it most often arises in the context of the failure of the AAA (or a similarly-situated body which has contracted to provide arbitral services) to join a motion to remove a state court action to federal court or in deciding how such a body should be considered for the purpose of determining whether diversity jurisdiction exists. *See Aberle Hosiery Co. v. American Arbitration Ass'n*, 337 F. Supp. 90, 92 (E.D. Pa. 1972). Some courts, in reliance on this principle of "unnecessary party," have ruled that an arbitral body (such as the AAA) is not a proper party in a suit to determine the propriety of arbitration and have dismissed the claims against it. *See Hospitality Ventures of Coral Springs, L.C. v. Am. Arbitration Ass'n*, 755 So.2d 159,

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5. IMG's position in this regard is somewhat confusing. As Plan Administrator, presumably IMG is the entity that would review and determine the appropriateness of any claims submitted pursuant to the Insurance Policy. As such, any disputes over a claim denial would be directed to IMG and not Sirius. Moreover, the present suit initiated by both IMG and Sirius seeks injunctive and declaratory relief relating to the construction of the Insurance Policy itself. We question the basis for IMG's standing to seek such relief if it has no rights and responsibilities under the contract. While we reserve judgment on the issue, IMG's own position as a plaintiff in this suit appears to belie its claim that it is not subject to the rights and responsibilities set out in the Insurance Policy.

160 (Fla. Ct. App. 2000); *McKown v. Am. Arbitration Ass'n*, 444 S.E.2d 114, 115 (Ga. Ct. App. 1994); *Candor Cent. Sch. Dist. v. Am. Arbitration Ass'n*, 411 N.Y.S.2d 162, 164 (Sup. Ct. 1978); *Peters Sportswear Co. v. Am. Arbitration Ass'n*, 233 A.2d 558, 560 (Pa. 1968); *see also Tamari v. Conrad*, 552 F.2d 778, 780 (7th Cir. 1977) (holding that defendant arbitrators have no interest in underlying dispute between the parties to arbitration and should not be made parties to that dispute). In so holding, these courts have concluded that "[t]he law does not require potential arbitrators to expend the time and money to participate in a lawsuit where the parties are fighting over the arbitrability of a dispute." *Hospitality Ventures of Coral Springs, L.C.*, 755 So.2d at 160; *see also McKown*, 444 S.E.2d at 115 ("[There is] a judicial preference to restrain parties to a controversy rather than restraining the tribunal from hearing the matter. . . ."). Applying this analysis, the AAA is unnecessary to the resolution of any claim directed at determining the propriety of arbitration and any claims against it should be dismissed.

Other courts have approached these issues in terms of "arbitral immunity," dismissing claims related to the propriety of arbitral proceedings asserted against the AAA (or a similar sponsoring body). Noting that such bodies have no interest in the underlying disputes subject to the arbitration and that the arbitral decision makers need to be protected from undue influence to preserve the integrity of the arbitral decision making process, these courts conclude that the sponsoring body (or the arbitrators themselves) "should not become parties to that [underlying] dispute" and that they are entitled to enjoy immunity on this basis. *Tamari*, 552 F.2d at 781.

Appendix C

Courts have also recognized that public policy strongly favors arbitration, analogizing to the principle of judicial immunity to shape the contours of arbitral immunity to suit. *See Olson v. Nat'l Ass'n of Sec. Dealers*, 85 F.3d 381, 382 (8th Cir. 1996); *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882, 885-86 (2d Cir. 1990); *Corey v. N.Y. Stock Exch.*, 691 F.2d 1205, 1208-11 (6th Cir. 1982); *see also, Hawkins v. Nat'l Ass'n of Sec. Dealers Inc.*, 149 F.3d 330, 331 (5th Cir. 1998) (dismissing claims against NASD pursuant to Rule 12(b)(6) as it enjoyed arbitral immunity from civil liability for the acts of its arbitrators in the course of conducting contractually agreed-upon arbitration proceedings).

Though the state of Indiana has not yet extended immunity to arbitral bodies, it, too, acknowledges the dual policies favoring arbitration and providing for judicial immunity. *E.g., Northwestern Mut. Life Ins. Co. v. Stinnett*, 698 N.E.2d 339, 343 (Ind. Ct. App. 1998) (noting that it is "well known that Indiana recognizes a strong policy favoring enforcement of arbitration agreements"); *Newman v. Indiana*, 129 F.3d 937, 941 (7th Cir. 1997) (noting that Indiana recognizes absolute judicial immunity). Thus, to the extent that IMG's claims against the AAA implicate these interests, we are confident that Indiana would extend arbitral immunity to protect the AAA and its agents from such claims.

We look to the holding in *Caudle v. Am. Arbitration Ass'n*, 230 F.3d 920 (7th Cir. 2000) to ascertain which claims would be subject to immunity, or alternatively, which claims for the resolution of which the AAA would be "unnecessary," and therefore properly dismissible. While the *Caudle* opinion turns on whether the amount in controversy necessary for

diversity jurisdiction had been met, the Court first addressed the issue of arbitral immunity. The Seventh Circuit questioned whether the principle precluding civil claims against the AAA was properly to be considered a policy of immunity or a conclusion that "arbitrators and organizing bodies are not the real parties in interest." *Id.* at 922 (citing Fed. R. Civ. P. 17(a)). Judge Easterbrook, writing for the Seventh Circuit, proposed a hypothetical, one in which the AAA could neither enjoy immunity nor assert that it was not a real party in interest:

> Suppose Caudle had paid the full $9,200 the AAA specified, and the Association had pocketed the money without arbitrating the dispute; it is unlikely that the AAA could claim 'immunity' in response to a demand for a refund (or an order to furnish the arbitration service for which it had been paid).

Id. Thus, from this case, we reason that a claim intended to determine whether an arbitral body has the authority to proceed is one in which the arbitral body itself has no real interest and its decision-making in this regard would be protected by "arbitral immunity," or, alternatively, is one in which the body is not properly joined under Rule 17(a). In contrast, a claim asserting an independent cause of action against the arbitral body, one contending that the body has liability that is distinct from that of the parties to the arbitration proceeding, would not be subject to the proposed immunity and would be one in which the body is a real party in interest.

Applying this rationale to the case at bar, it is apparent that the AAA has no interest in Plaintiffs' claims in Counts II and III and is not a necessary party to a fair and complete resolution of those claims. These claims related to the underlying dispute, requesting equitable relief vis-a-vis the Insurance Policy; they are directed at the issue of whether the parties' dispute itself is arbitrable. Involvement by the AAA is therefore unnecessary to a resolution of issues of arbitrability and it is not a proper defendant with respect to those issues; stated otherwise, the AAA's decisions in this regard are protected by arbitral immunity. In any event, plaintiffs will be able to obtain all the equitable relief they seek in Counts II and III from the Non-AAA Defendants. Any stay or injunctive relief imposed would be indirectly binding upon the AAA and would preclude the arbitration from going forward. Thus, as against the AAA, Counts II and III are dismissed.

However, Count I is analogous to the *Caudle* hypothetical, *supra*, and is distinguishable from the two counts which seek equitable relief. Count I alleges that the AAA colluded with the Non-AAA Defendants in pursuing the arbitration, for which injury Plaintiffs seek money damages. If we assume that the complaint states a claim against the AAA (an issue we discuss more fully below), the AAA might have liability that is separate from and independent of that of the Non-AAA Defendants. Thus, the AAA's contention that it is unnecessary to Count I is unavailing.[6]

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6. Since we conclude, *infra*, that none of the allegations in Count I state a claim for relief as against the AAA, we need not determine whether it would enjoy arbitral immunity from them as a matter of law. However, the reasoning found in *Caudle* implies that no per se immunity would exist.

Appendix C

D. Failure to State a Claim

Having resolved all claims against Brown and Germani on personal jurisdiction grounds and Counts II and III against the AAA, the only remaining count to be analyzed under Rule 12(b)(6) is the portion of Count I against the AAA which alleges malicious prosecution, abuse of process and bad faith arbitration.

As a preliminary matter, we note that the parties agree that the claim of "bad faith arbitration" is one that has not been recognized in Indiana or to our knowledge any other jurisdiction. The AAA asserts that this claim is more properly to be considered one for abuse of process. Although IMG responds that bad faith arbitration is an independent cause of action, it fails to identify the elements of this novel theory or to provide any analysis beyond asserting that it is a non-frivolous argument for the extension or modification of existing law or the establishment of new law. Having completely failed to brief the substantive contours of such a cause of action in the face of a motion to dismiss the claim, we hold that IMG's claim for bad faith arbitration is duplicative of its claim for abuse of process or in the alternative that it has waived any such claim. Thus, IMG's claim for bad faith arbitration is dismissed as against the AAA.

Turning to IMG's malicious prosecution claim, in order to make out a prima facie case of malicious prosecution, the plaintiff must allege facts sufficient to support that: (1) the defendant instituted or caused to be instituted a prosecution against the plaintiff; (2) the defendant acted with malice in doing so; (3) the prosecution was instituted without

probable cause; and (4) the prosecution terminated in the plaintiff's favor. *Butt v. McEvoy*, 669 N.E.2d 1015, 1017 (Ind. Ct. App. 1996). Although traditionally intended to provide recourse to criminal defendants who have been wrongfully charged, it is also available to those who allege that civil proceedings have been maliciously initiated against them. *Mirka v. Fairfield of America, Inc.*, 627 N.E.2d 449, 451 n.3 (Ind. Ct. App. 1994); *Wong v. Tabor*, 422 N.E.2d 1279, 1281 n.2 (Ind. Ct. App. 1981). In fact, Indiana courts have noted that the proper term for a claim such as IMG's (where the alleged proceeding was not criminal in nature) is for wrongful use of civil proceedings. *E.g.*, *Wong*, 422 N.E.2d at 1281 n.2, 1284 (quoting RESTATEMENT (SECOND) OF TORTS § 674 cmt. j (1977)). In any event, the elements of the two claims are substantially similar. *Id.* The AAA disputes that it ever initiated or caused to be initiated a prosecution or that any such prosecution has been terminated in IMG's favor. We need not address here the first of these arguments as it is plainly apparent that IMG has failed to allege facts sufficient to establish the claim's final element.

The Restatement provides that the termination necessary to state a claim for wrongful use of civil proceedings can be shown by:

> (1) the favorable adjudication of the claim by a competent tribunal, or (2) the withdrawal of the proceedings by the person bringing them, or (3) the dismissal of the proceedings because of his failure to prosecute them. A favorable adjudication may be by a judgment rendered by a court after

> trial, or upon demurrer or its equivalent. In either case the adjudication is a sufficient termination of the proceedings, unless an appeal is taken.

Id. § 674 cmt. j, *quoted in*, *Wong*, 422 N.E.2d at 1284; *see also Hammond Lead Prods., Inc. v. Am. Cyanamid Co.*, 570 F.2d 668, 673 (7th Cir. 1977) (applying Indiana law and citing § 674). For example, the granting of summary judgment in favor of the party alleging injury would constitute the "termination" of the prior proceedings. *Wong*, 422 N.E.2d at 1284. The Seventh Circuit expounded upon the rationale for requiring that the party bringing the claim for wrongful use of civil proceedings wait until the initial proceeding has terminated in his favor:

> It is both fair to the parties and economically convenient to the judicial system to allow defendant to proceed (unaffected by estoppel by judgment or like doctrines) with his original action. Defendant ought to have his day in court in the locus where he began the controversy. Until that first court has decided the merits, or has ruled that it will not decide the case for want of jurisdiction or improper venue, or defendant in his capacity as plaintiff in the first action has withdrawn from the first litigation, plaintiff is premature. To be sure, plaintiff already has been injured by the bringing of the first action, but it is socially convenient to make him await the outcome of the first case in order to save the time and expenses

> of litigants and courts. As long as the proceedings are going on in the first court, the second court will not be bothered to hear the matter.

Hammond Lead Prods., Inc., 570 F.2d at 672.

Indiana clearly requires that in order to maintain a cause of action for malicious prosecution or wrongful use of civil proceedings, it is necessary that "the primary action upon which malicious prosecution [or wrongful use of civil proceedings] is based has terminated in [the aggrieved party's] favor before the commencement of an action for malicious prosecution [or wrongful use of civil proceedings]." *First Fed. Sav. and Loan Ass'n of Gary v. Stone*, 467 N.E.2d 1226, 1235 (Ind. Ct. App. 1984); *see also West v. Hayes*, 3 N.E. 932, 933 (1885) ("A right of action for a malicious prosecution does not arise until the action complained of is finally determined, and the fact of final determination must be set out in the petition."). Even if we assume that the AAA caused the arbitration at issue to be initiated (an assumption we shall refute shortly), that arbitration was not terminated at the time IMG filed the instant complaint and still has not been terminated. The only culminating actions to which IMG can point are the imposition of a temporary restraining order and preliminary injunction by the Indiana trial court prior to this action's removal to our court. Setting aside the fact that such relief had not been granted prior to the filing of the complaint (and therefore could not serve as a basis for IMG's claim asserted in that complaint), such preliminary relief is not a final decision on the merits of the litigation that would set the stage for dismissal of the arbitration, and in any event neither of these actions has resulted in the arbitration's

termination in IMG's favor. *E.g.*, *MacDonald v. Chicago Park Dist.*, 132 F.3d 355, 357-58 (7th Cir. 1997). Thus, whether we construe IMG's claim to be one for malicious prosecution or for wrongful use of civil proceedings, the claim is not yet ripe and must be dismissed.

IMG's final claim is for abuse of process. A prima facie case of abuse of process requires proof of " 'first, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceedings.' " *Groen v. Elkins*, 551 N.E.2d 876, 878 (Ind. Ct. App. 1990) (quoting PROSSER AND KEETON, THE LAW OF TORTS, 898 (5th ed. 1984)). Otherwise stated, "abuse of process requires a finding of misuse or misapplication of process, for an end other than that which it was designed to accomplish." *Reichhart v. City of New Haven*, 674 N.E.2d 27, 30 (Ind. Ct. App. 1996) (quoting *Broadhurst v. Moenning*, 633 N.E.2d 326, 333 (Ind. Ct. App. 1994) (internal quotation marks and citation omitted)). Proof of improper motive alone is insufficient to proceed with an abuse of process claim; a plaintiff must establish that a defendant has employed "improper 'process' before the court proceeds to an examination of the defendant's motive." *Id.* (citing *Comfax Corp. v. N. Am. Van Lines, Inc.*, 638 N.E.2d 476, 485 (Ind. Ct. App. 1994)); *Walters v. Dinn*, 633 N.E.2d 280, 289 (Ind. Ct. App. 1994); *Groen*, 551 N.E.2d at 876. Indiana courts have determined that a party may not be liable for abuse of process where legal process has been used to accomplish an outcome which that process was designed to accomplish. *Reichhart*, 674 N.E.2d at 31; *Comfax Corp.*, 638 N.E.2d at 485. "Process" in this context includes any action undertaken by a litigant in pursuing a legal claim. *Reichhart*, 674 N.E.2d at 32; *Groen*, 551 N.E.2d at 879.

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Since the defendant's motive is irrelevant unless there has been some process which has been misused, we consider the latter issue first. The AAA contends that it has not undertaken any "process" that can could be construed as having been misused. Insofar as the "process" which serves as the predicate for IMG's claim consists of the arbitration claim's initiation, the AAA rightfully responds that it was Ogdon and the other Non-AAA Defendants who initiated and employed this process, not the AAA. The AAA's role has been analogous to that of a court clerk who has placed on the docket a case filed by a claimant.

Accepting the analogy of a court clerk, it is clear from the facts of this case that the AAA was confronted with a claim for arbitration which it dutifully "docketed." In contrast to a clerk of court who would be required to docket any complaint filed with the court (at least if it satisfied facially the requirements of the applicable state or federal rules), the AAA must make a preliminary determination that the claim for arbitration is made pursuant to a contract authorizing arbitration; however, in neither case is the person responsible for docketing the claim expected or required to engage in a searching, substantive review of the claim's merits prior to docketing.

The contrary position (and the one asserted here by IMG) would require the AAA to become involved in conducting substantive analyses, such as determining the arbitrability of a claim, a requirement which could seriously impinge upon the AAA's ability to maintain neutrality in providing an arbitral forum. Clearly the case managers employed by the AAA are not charged with weighing the merits of a given

party's contention that a dispute is not arbitrable. IMG itself acknowledges that the AAA does not have the authority to determine issues of arbitrability, but cites the correspondence between Brown (on behalf of the AAA) and IMG as evidence that the AAA has in fact made such a determination; since it issued "process" on the basis of that determination, process which IMG characterizes as abusive, and ordered that arbitration proceedings to commence in the absence of a judicial stay, IMG believes that to be a sufficient basis for liability on the part of the AAA.

However, we are of the view that the performance of such administrative duties is not equivalent to issuing "process." The AAA's order to proceed with the arbitration is no different than that emanating from a court after a lawsuit has been filed — the case would proceed until a judicial determination was made, either *sua sponte* or in response to a motion, that the cause failed for lack of jurisdiction or on the merits of the claim. Although IMG contends that this is the exact situation it faced in the arbitration, the distinction is that the AAA and Brown were not competent to consider IMG's "motion." Whether those arguments should properly be put to an arbitration panel or advanced in a judicial forum is immaterial; what matters is that they were not properly before the AAA itself. In the absence of any "process" initiated or caused to be initiated by the AAA, IMG's allegation of abuse of process by the AAA warrants dismissal for failure to state a claim.

Appendix C

Conclusion

For the reasons stated above, the AAA Defendants' motion to dismiss is *GRANTED*. All claims against Defendants Brown and Germani are hereby *DISMISSED* for lack of personal jurisdiction. Counts II and III are *DISMISSED* as against the AAA inasmuch as it is an unnecessary party which has been improperly joined or, alternatively, because it enjoys arbitral immunity to such claims and Count I is *DISMISSED* as against the AAA for failure to state a claim.

It is so ORDERED this 25th day of May 2001.

s/ Sarah Evans Barker
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC DATED JANUARY 8, 2003

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

January 8, 2003

Before

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

No. 01-3270

INTERNATIONAL MEDICAL GROUP, INC. and SIRIUS INTERNATIONAL INSURANCE CORPORATION (publ),

Plaintiffs-Appellants,

v.

AMERICAN ARBITRATION ASSOCIATION, INC., JANELLA BROWN, et al.,

Defendants-Appellees.

Appendix D

ORDER

On consideration of the petition for rehearing, with suggestion for rehearing en banc filed by plaintiffs-appellants on December 27, 2002, all of the judges on the original panel have voted to deny the petition, and none of the active judges have requested a vote on the rehearing en banc.

IT IS HEREBY ORDERED that the aforesaid petition for rehearing with suggestion for rehearing en banc be, and the same is hereby, DENIED.